Supreme Court, U.S.
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Case No. _____

IN THE

Supreme Court of the United States

JANUARY TERM 1997

BOB McLEMORE AND COMPANY, INCORPORATED, ET AL

APPELLANT,

VS

BRANCH BANKING & TRUST COMPANY , ET AL

APPELLEE,

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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129 pp

QUESTIONS PRESENTED FOR REVIEW

(1.) Whether a United States court of appeals, in reviewing a trial court's grant of summary judgment on the ground that claims were barred by the terms of release agreements, must give full consideration to all appropriate evidence in the record relevant to the validity and scope of the release agreements, and must apply all pertinent principles for ruling on a motion for summary judgment under F.R.C.P. Rule 56.

(2.) Whether, on an appeal by parties against whom a multi-million dollar summary judgment has been awarded on a counterclaim, a United States court of appeals must fully consider and rule upon a claim by the appealing parties that the granting of summary judgment was error.

(3.) Whether, on an appeal by parties from a summary judgment denying their claims against a lender based on alleged commitments to lend, a United States court of appeals must fully consider and rule upon a claim by the appealing parties that the granting of summary judgment was error.

PARTIES

(A) Petitioner Robert V. McLemore is an individual. The other petitioners are all corporations duly organized and existing under and by virtue of the laws of the State of North Carolina, with their principal offices and places of businesses located in Charlotte, Mecklenburg County, North Carolina. Bob McLemore Homes, Inc., Apple Homes, Inc., Apple Realty 2000, Inc., BMI Land Company, Inc., and MACO Homes, Inc. are all wholly-owned subsidiaries of respondent Bob McLemore and Company, Inc.. The corporate Petitioners will hereinafter be referred to collectively as the "McLemore Group". Petitioner Robert V. McLemore is the sole shareholder of Bob McLemore and Company, Inc..

(B) Petitioners are informed and believe that Branch Banking and Trust Company (BB&T) is a banking corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, with an office and place of business located in Charlotte, Mecklenburg County, North Carolina. Petitioners further are informed and believe that respondent Home Federal Savings & Loan Association of Charlotte (Home Federal) at all times relevant to the claims in the proceedings below was a mutual Savings & Loan Association duly organized and existing under and by virtue of the laws of the United States of America, with its principal office and place of business located in Charlotte, Mecklenburg County, North Carolina.

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OPINIONS BELOW

The September 10, 1996 opinion of the United States Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, is unreported, and is reprinted in the Appendix to this Petition, at pp. A-1to A-11. An order of the Court of Appeals dated October 8, 1996, denying Petitioner's petition for rehearing and suggestion for rehearing en banc appears in the Appendix to this Petition at pp. A-65, A-66. The prior judgments and findings of fact and conclusions of law by the United States District Court for the Western District of North Carolina also appear in the Appendix to this Petition at pp. A-12 to A-64.

JURISDICTION

An order denying respondent's petition for rehearing and suggestion for rehearing en banc was entered by the court below on October 8, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Secs. 1254(1) and 2101(c).

PROCEDURAL RULE INVOLVED

This case involves the propriety of disposition of a case through summary judgment under F.R.C.P. Rule 56. The text of the rule is set out in its entirety in the Appendix to this Petition at pp. A-67, A-68.

STATEMENT OF THE CASE

The present case originated as a civil action brought in a North Carolina state court against respondents by members of the McLemore Group. This action was subsequently removed to the United States Bankruptcy Court for the Western District of North Carolina as a result of bankruptcy proceedings having been initiated on behalf of three of the McLemore Group corporations. The civil action was then litigated as an adversary proceeding before the bankruptcy court. The bankruptcy court had jurisdiction over the proceeding under 28 U.S.C. Sec. 1452.

Each respondent herein filed a summary judgment motion in the bankruptcy court, and the bankruptcy judge made recommendations that summary judgment be granted on both motions. The United States District Court Judge subsequently adopted the recommendations of the bankruptcy Judge, and entered summary judgment in favor of each respondent. The primary basis for entry of summary judgment was that all the claims against respondents had been released pursuant to release agreements. These judgments were affirmed by the Court of Appeals soley on the ground that all claims against respondents had been released pursuant to release agreements.

The claims involved in the action below concerned the following matters which were not disputed. Petitioner Robert V. McLemore has been engaged in the business of development and sales of residential properties in the Charlotte, North Carolina area during the entire period relevant to the claims asserted below. Beginning in 1972, respondent Home Federal made its first loan to a McLemore Group entity. This represented the beginning of a long- term relationship under which Home Federal became the

primary lender to the McLemore Group. During this period of time, a relationship of trust and confidence developed between Robert V. McLemore and the principal officers of Home Federal, H. Joe King, Jr. and J. Harold Barnes, Jr.. Under the financing scheme employed by the McLemore Group, continuous availability of financing was essential.

In 1988, King and Barnes approved a proposed expansion of the McLemore Group's residential development activities. However, a change in federal law in August of 1989 placed limitations on the ability of Home Federal to provide the necessary financing. At this point, respondent BB&T actively solicited the McLemore Group as a client, and lending commitments were made between the McLemore Group and BB&T in 1990 and 1991. BB&T led McLemore to believe that these commitments were to be of long-term duration. However, unknown to McLemore, BB&T had become interested in acquiring Home Federal through a merger in late 1989, and negotiations for such a merger commenced.

Loan commitments of the nature and magnitude of Home Federal's to the McLemore Group were contrary to BB&T's lending policies. Therefore, the relationship between Home Federal and the McLemore Group impaired the attractiveness of Home Federal as a merger target for BB&T. This circumstance was the root cause of the eventual commencement of the litigation below. Petitioners sought recovery against respondents based on claims that the respondents conspired to reduce the McLemore Group to financial ruin in order to justify termination of the McLemore Group's lending relationship with the respondents, and

particularly the relationship with respondent Home Federal. A substantial number of specific acts by respondents were alleged in support of Petitioners' claims. (For the claims asserted by Petitioners in their complaint, see pp. A-88, A-99 of the Appendix hereto.)

Subsequent deterioration of the financial circumstances of the McLemore Group entities lead to the execution of "loan workout" agreements involving loans made by respondents to the McLemore Group. A loan workout agreement executed with respondent BB&T on April 8, 1993, contained a release of claims provision. Similarly, a subsequent loan workout agreement executed with respondent Home Federal on August 20, 1993 contained a release of claims provision. The release of claims provision in the BB&T agreement contained no language whatsoever indicating that it would apply to claims which accrued after the date of the agreement. Similarly, the release of claims provision in the Home Federal agreement contained no language indicating that it would apply to claims which accrued subsequent to the date of execution of the agreement. Further, the Home Federal agreement stated that its terms would be applicable only to nine enumerated loans described in an appendix to the Home Federal agreement. (For the content of the BB&T release agreement, see pp. A-66, A-67 of the Appendix hereto, and for the entire content of the loan workout agreement with Home Federal, see pp. A-68 to A-77 of the Appendix hereto, and particularly p. A-71 for the provisions of the release.) Also, in seeking summary judgment Home Federal failed to indicate in any manner how any particular claim in Petitioners' complaint was related to the nine loans which were the subject of the Home Federal agreement.

The only dispositive motions filed by respondents below regarding Petitioners' claims sought summary judgment on the grounds of the release agreements, the statute of frauds, the alleged invalidity of particular loan commitments, and the statute of limitations. Other than as indicated above, respondents never placed in issue whether or not Petitioners' claims failed to state actionable wrongs committed by respondents, or whether Petitioners could not prove actionable wrongs committed by respondents against them. Accordingly, the only issues relevant to the present Petition for Certiorari with regard to defenses available to respondents are the ones actually raised below by respondents. Unfortunately, Petitioners suspect that in response to this Petition the respondents may attempt to argue the merits of defenses that they did not raise below, perhaps supported by a voluminous Appendix in an attempt to prejudice this court as to the merits of this Petition for Certiorari.

In addition to entering summary judgment against Petitioners on all their claims, the trial court also entered summary judgment against some of the Petitioners on counterclaims for recovery on loans made by respondents. Petitioner Robert V. McLemore was added as a third-party defendant on the counterclaims. A judgment in an amount in excess of eight million dollars was entered against Petitioner Robert V. McLemore individually on the counterclaim by Home Federal, based on a loan guaranty agreement executed for the benefit of Home Federal on November 9, 1990. (A copy of the guaranty agreement appears in the Appendix hereto, at pp. A-78 to A-81.) The most relevant provision of the agreement appears in the very first sentence which states that the agreement was made "...as an inducement to Lender to loan funds

from time to time...". Based upon the guaranty agreement containing this language, the trial court found that the agreement applied to loans which were made prior to November 9, 1990. (See, p. A-44 of the Appendix hereto.) On appeal, no reference to the judgment on the counterclaims was made by the appellate court.

With regard Petitioners' claims against each respondent, the district court found that the release agreements released all the claims. (See p. A-28 of the Appendix hereto.) The district court also found that loan commitments which were allegedly breached were barred under a statute of frauds. (See p. A-46 of the Appendix hereto.)

With regard to an alleged breach by respondents of commitments to lend, the district court concluded that the commitments were unenforceable because they did not have the requisite terms for binding commitment to lend. (See pp. A-30, and A-46 of the Appendix hereto.)

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Under This Court's Exercise Of Its Supervisory Powers to Minimize And Remedy Extreme Departures From The Accepted And Usual Course Of Judicial Proceedings.

Petitioners are fully aware that review on certiorari is not a matter of right but of judicial discretion, and that a petition for a writ of certiorari will be granted only for compelling reasons. (Rule 10, United States Supreme Court Rules of Practice.) However, the reasons which this court considers in determining whether to grant a writ of certiorari include whether a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Id., 10(a). Based upon the matters set forth below, the present case is one which clearly calls for the invocation of this Court's supervisory powers.

The accepted and usual course of judicial proceedings in determining motions for summary judgment under F.R.C.P. Rule 56 are well established by decisions of this Court and decisions of the United States Court of Appeals for the Fourth Circuit. Under this accepted and usual course of proceedings involving Rule 56 motions, summary judgment is authorized only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and where no genuine issue remains for trial. The purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try. See Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944), quoted and followed in Poller v. Columbia Broadcasting System, 368 U.S. 464, 467 (1962). The inquiry in

ruling on a summary judgment motion is whether the evidence presents a sufficient disagreement to require submission to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). Further, in ruling on a motion for summary judgment, credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Id., at 477 U.S. 255. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. It is implicitly mandated by the above pronouncements of this Court that the word "evidence" means all pertinent evidence submitted by the parties for consideration of the Court.

The Court of Appeals for the Fourth Circuit has also articulated a number of highly relevant propositions which delineate the accepted and usual course of judicial proceedings in that circuit for determination of motions for summary judgment. First among these is that the appellate court conducts de novo review of rulings by trial courts on motions for summary judgment. (See, p. A-8 of the Appendix hereto.) Also, it has been recognized that one of the important functions of the summary judgment process is to elicit the positions of the parties and have them tested under applicable law. See Hebron v. American Isuzu Motors, Inc. 60 F. 3d 1095, 1098 (4th Cir. 1995), citing Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). This proposition by necessary implication requires that a court consider all plausible positions advanced by the parties in support of or in opposition to a summary judgment motion. Since the granting of summary judgment operates to deprive the non-moving party of availability of a trial by jury, it follows that summary judgment

should never be granted without full consideration of all the evidence, authorities and arguments relied upon by the non-moving party unless the assertions of the non-moving party are patently and facially frivolous.

The Court of Appeals for the Fourth Circuit has articulated a number of premises which delineate the accepted and usual course of judicial proceedings in determination of summary judgment motions where the interpretation of a contract is in question. In considering the propriety of summary judgment in a contract case, the court generally may not look beyond the four corners of a document. See Bear Brand Hosiery Co. v. Tights, Inc., 605 F. 2d 723, 726 (4th Cir. 1979). However, only an unambiguous writing justifies summary judgment, and no writing is unambiguous if susceptible of two reasonable interpretations. Id. This accords with the principle that the intention of the contracting parties is a question of fact. Id. If there is more than one permissible inference as to intent to be drawn from the language employed, the question of the parties' actual intention is a triable issue of fact. Id.

It has been recognized in the Fourth Circuit that the first step for a court asked to grant summary judgment based on a contract's interpretation is to determine whether, as a matter of law, the contract is ambiguous or unambiguous on its face. World-Wide Rights Ltd. v. Combe, 955 F. 2d 242, 245 (4th Cir. 1992). If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue. Id. However, an ambiguous contract that cannot be resolved by credible, unambiguous, extensive evidence discloses genuine issues of material fact. See, e.g., Semipone v. Provident Bank of Maryland,

75 F. 3d 951, 959 (4th Cir. 1996). In this event, summary judgment is inappropriate. Id. The above expressed views of the Court of Appeals for the Fourth Circuit are summarized by that court's recognition that when disposition of a case turns on a determination of intent, courts must be especially cautious in granting summary judgment. This is particularly so where the issue of intent relates to an ambiguous contract or document since the intent of the parties to an ambiguous contract is a question of fact which cannot properly be resolved on motions for summary judgment. Morrison v. Nissan Co., Ltd., 601 F. 2d 139, 141 (4th Cir. 1979).

The courts of North Carolina have expressed views on the above matters similar to the views of the Fourth Circuit, and these views include the following propositions. When a court is asked to interpret a contract, its primary purpose is to ascertain the intent of the parties. Lane v. Scarborough, 284 N.C. 407, 200 S.E. 2d 622 (1973). Accordingly, the scope and extent of a release is to be governed by the intent of the parties, which is to be determined by reference to the language, subject matter and purpose of the release. Travis v. Knob Creek, Inc., 321 N.C. 279, 362 S.E. 2d 277 (1987).

If a contract is plain and unambiguous on its face, it will be interpreted by a court as a matter of law. Lane v. Scarborough, supra. However, when an agreement is ambiguous and the intent of the parties is unclear, interpretation of the contract is for the jury. International Paper v. Corporex Constr., 96 N.C. App. 312, 385 S.E. 2d 553 (1989). North Carolina law also conforms to the "universally-accepted" proposition that an ambiguity in a written agreement is to be construed against the party who drafted the agreement. Root v. Allstate Ins. Co., 272 N.C. 580, 158 S.E. 2d 829 (1968); as to this Court's adherence to the rule in question, see, e.g., Mastrobuono v.

Shearson Lehman Hutton, Inc., _____ U.S. _____, 115 S. Ct. 1212, 1219 (1995).

When the rulings in the Court of Appeals and the trial court in the instant case are evaluated in light of the above-discussed propositions of law, it is clear that these rulings represent an extreme departure from the accepted and usual course of judicial proceedings. Petitioners called the attention of the Court of Appeals to a decision of the Supreme Court of North Carolina which clearly ruled that the provisions of a release do not release future claims unless expressly stated. The case cited was Travis v. Knob Creek, Inc., supra.. However, claims by Petitioners that the release agreements did not cover post-release claims were totally disregarded by both the trial court and the Court of Appeals. Each court then proceeded to find that the release agreements released all claims asserted by Petitioners below even though both the allegations of the complaint and evidence in the record indicated that some of the claims involved acts of respondents which occurred after the respective dates of execution of the release agreements.

Petitioners quite expressly asserted before the trial court and the Court of Appeals that the loan guaranty agreement with Home Federal did not cover any loans which were made before its date of execution, November 9, 1990. The trial court nevertheless proceeded to totally disregard these assertions, and entered a judgment in the amount of approximately eight million dollars against Petitioner Robert V. McLemore, personally, based on loans which were made prior to the date of execution of the loan guaranty agreement. This multi-million dollar judgment was entered against Petitioner McLemore despite the clear assertions by Petitioners that the loan guaranty agreement was at least ambiguous as to whether its

terms applied to any loans made prior to the date of execution of the agreement. The Court of Appeals completely disregarded the assertions of Petitioners regarding the scope of the guaranty agreement, and the appellate court did not even indicate that the issue had been raised in the appeal, but affirmed the multi-million dollar judgment against Petitioner McLemore. (As to whether the issue was raised before the Court of Appeals, see p. A-85 of the Appendix hereto.)

In opposition to assertions by respondents below that loan commitments allegedly made by them were invalid because of the statute of frauds, Petitioners asserted that the principal loan commitment by respondent Home Federal was made in 1988, and that the relevant statute of frauds was not enacted until 1989. Both the trial court and court of appeals completely ignored this assertion made by Petitioners and the court of appeals failed to mention entirely that the issue of the statute of frauds was involved in the proceedings. (For the findings and conclusions of the trial court on the statute of frauds issue, see p. A-44 of the Appendix hereto.) In finding that there was no enforceable 1988 loan commitment by Home Federal because of a lack of legally-required terms, the district court completely ignored evidence, arguments and legal authority cited by respondents to show that the requisite terms could be supplied by a course of dealings. (For the findings and conclusions of the district court on this matter, see pp. A-30, and A-44 of the Appendix hereto.) This matter, as with all other issues embraced in the discussion in this Petition, was raised and briefed before the Court of Appeals. (See, pp. A-82 to A-87 of the Appendix hereto.) As with other issues except the validity and scope of the release agreements, the court of appeals completely ignored the fact that this issue had

been presented to it for its consideration and determination.

The Home Federal loan workout agreement specifically states that it applies to nine enumerated loans which are identified by use of a capital "L" each time a reference is made to those loans. (See, p. A-68, et seq. of the Appendix hereto.) A similar use of the word "Loans" is made in the release agreement. (See, p. A-71 of the Appendix hereto.) In reaching a conclusion that the release provisions applied to all of Petitioners' claims below, both the trial court and the Court of Appeals were required to follow the accepted and usual course of proceedings in the Fourth Circuit in determining motions for summary judgment based upon interpretation of contracts. It is quite clear from the findings and conclusions of the district court and the opinion of the Court of Appeals that neither court conformed its adjudicative process to the accepted and usual course of judicial proceedings. Copies of the allegations of the complaint below and copies of the table of contents to Petitioners' brief in the Court of Appeals appear in the Appendix to this petition. (See, pp. A-82 to A-87 and A-88 to A-99 of the Appendix hereto.) It is clear beyond dispute that the issues raised in the proceedings below went well beyond a mere nine particular loans made by respondent Home Federal. Consequently, had either the trial court or the Court of Appeals followed the accepted and usual course of judicial proceedings in matters involving interpretation of contracts, it would be difficult to see how either court could have found that the Home Federal release embraced all the claims made by Petitioners' against Home Federal.

In accepting the arguments of respondents below that there could have been no fraud in inducement of the release provisions, both the district court and the Court of Appeals determined that no

such fraud had been established. (See, pp. A10, A-11 of the Appendix hereto.) It should be noted that while legal authority was cited by the district court, the Court of Appeals cited no legal authority in support of its conclusion on this matter.

Petitioners presented the courts below with clear and controlling North Carolina legal authority to the effect that the validity of an instrument can be affected by "fraud in the treaty" even where a party knowingly executes the very instrument he intended to execute but is induced to do so by some false and fraudulent representation. The cited authority was Mills v. Lynch, 130 S.E. 2d 541, 544 (N.C. 1963). Respondents also presented evidence which would have supported a finding of "fraud in the treaty" such as would void at least the Home Federal loan workout agreement. The district court granted summary judgment and the Court of Appeals affirmed the summary judgment without taking any note whatsoever of the existence of this evidence and binding legal authority in the form of a decision of the Supreme Court of North Carolina.

Resolution of the issue of the scope and validity of the Home Federal loan workout agreement, including the release provision, was of most critical importance in the proceedings below. In addition to the release agreement, the Home Federal loan workout agreement contained a recital regarding the loan guaranty. (See, p. A-68 of the Appendix hereto.) If the Home Federal loan workout agreement were found to be invalid on the grounds of fraud in the treaty, then both the release provisions and all other recitals and terms in that document would be found unenforceable.

The matters set forth above in this petition are not presented to the Court based on any notion that they represent merely legal error on the part of the courts below which would warrant the invocation of

this court's discretionery review under certiorari. These matters are presented because they raise questions which go to the very foundation of our system of adjudication of legal disputes in the United States of America. It is fundamental to that system that each party before a court have ample opportunity to present for consideration of a tribunal all matters relevant to the claims or defenses of that party. It is implicit in this right that a court will give full consideration to all such matters which are not patently or facially frivolous.

The accepted and usual course of judicial proceedings in our system of justice requires faithful adherence to established protections and procedures. These protections and procedures serve two principal purposes. They exist in the first instance to ensure to the greatest extent reasonably feasible that all parties to judicial proceedings receive a "fair hearing". Assurance of a fair hearing in turn serves to facilitate accomplishment of the second purpose of these protections and procedures, which is to ensure to the greatest extent reasonably feasible that legal proceedings culminate in legally-correct decisions. The mandates of this Court with regard to the manner in which determinations are to be made under Rule 56 are calculated to serve these purposes. The same is true of the requirement of de novo review by an appellate court of rulings on motions for summary judgment. In addition, particular rules such as those regarding interpretation of contracts are calculated to ensure that judicial proceedings involving that issue result in legally-correct decisions.

The protections and procedures designed to ensure a fair opportunity to be heard and correctness of decisions additionally serve another and perhaps equally important purpose. Adherence to

these protections and procedures gives judicial proceedings the appearance of fairness and reliability in terms of the correctness of decisions. Such an appearance and perception created by the manner in which judicial proceedings are conducted is essential to the public confidence indispensible for our system of justice to effectively serve as a final arbiter of disputes between members of society.

Where dispositive rulings in judicial proceedings are based on interpretation of written instruments, and applicable substantative and procedural principles and plausible evidence, legal authorities and arguments of one party appear to have been completely ignored, substantial questions exist as to whether that party has had a fair opportunity to be heard and whether the rulings are legally correct. The significance of such circumstances, of course, would be greatly enhanced where interpretation of a written instrument would result in a multi-million dollar judgment being entered against a party. The questions of fair opportunity to be heard and legal correctness are magnified even more in importance where it appears that a party has been denied any hearing and determination on appeal as to the correctness of a trial court's ruling granting summary judgment in a multi-million dollar amount.

Substantial questions must also exist as to whether a party has had a fair opportunity to be heard and as to the correctness of a ruling where a decision is made that a particular document which by its terms is executed to induce a particular action can be construed as an inducement to perform acts which already have been performed. Similarly, substantial questions must exist as to whether there has been a fair opportunity to be heard and as to correctness of a ruling where the law of a jurisdiction provides that an instrument may be avoided on the grounds of fraud even if it is the instrument a party

intented to execute, but the court nevertheless rules that there can be no claim of fraud because the party had an opportunity to and actually did become aware of the contents of the instrument. The substantial questions which exist as to the matters immediately discussed above exist as to all other pertinent issues raised in this Petition.

Petitioners cannot stress too strongly that they do not seek review by this Court merely because of the severity of the consequences suffered by them as a result of the rulings below. They recognize that no matter how important the outcome of judicial proceedings may be to particular parties, this circumstance does not contstitute a compelling reason for this Court to grant review. Petitioners seek review by this Court because of the overriding importance to all parties who appear before the federal courts that they be assured of fidelity by those courts to protections and procedures which are inherent in the accepted and usual course of judicial proceedings.

Parties appearing before federal courts are entitled to the greatest measure of assurance that those court will not substantially deviate from the accepted and usual course of judicial proceedings whether a federal court in a particular case is called upon to rule upon federal questions, or, where appropriate, on questions of state law. The only effective means of minimizing the incidence of substantial departure by lower federal courts from the accepted and usual course of judicial proceedings is for this Court from time to time, in particular cases, to give direction to all lower federal courts that any extreme departures from the accepted and usual course of judicial proceedings will be remedied by this Court.

CONCLUSION

Petitioners have demonstrated above that there are sufficient grounds to invoke the discretionary power of review by this Court because the United States Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings that the supervisory power of this Court must be exercised to correct that departure. Petitioners accordingly ask that this Court grant this Petition for Writ of Certiorari to the court below, and that following plenary review of the record of the proceedings below, this Court reverse and remand this matter to the lower court with directions to make a disposition of Petitioners' appeal to that court in a manner which does not substantially depart from the accepted and usual course of judicial proceedings.

Resepectfully submitted,

S/ Fred A Culver.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner for Writ of Certiorari was mailed by regular U.S. mail to:

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

In Re: MACO HOMES, INCORPORATED,
Case No. 95-2938
Debtor. 95-2939

BOB McLEMORE AND COMPANY, INCORPORATED; BOB McLEMORE HOMES, INCORPORATED; APPLE HOMES, INCORPORATED; APPLE REALTY 2000, INCORPORATED; BMI LAND COMPANY, INCORPORATED; MACO HOMES, INCORPORATED,

Plaintiffs-Appellants,

V.

BRANCH BANKING & TRUST COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE,
Defendants-Appellees,

V.

ROBERT V. McLEMORE,
Third Party Defendant.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte.
Graham C. Mullen. District Judge.
(CA-95-60-3-MU, CA-95-11-3-MU, BK-94-30421)

Argued:April 5, 1996

Decided: September 10, 1996

Before RUSSELL and MOTZ, Circuit Judges, and LAY Senior Circuit Judge of The United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED, Wyatt B. Durrette. Jr., DURRETTE,. IRVIN & BRADSHAW, P.C., Richmond ,. Virginia. for Appellants. Edwin Osborn Ayscue, Jr., SMITH,. HELMS,. MULLISS & MOORE. L.L.P., Charlotte, North Carolina, for Appellee Branch Banking: Robert C. Stehens,. HORACK, TALLEY, PHARR & LOWNDES, Charlotte, North Carolina, for Appellee Home Federal. **ON BRIEF:** William 0. Quirey, Hammarstrom Davies, Duram North Carolina, for Appellants. Robert H. Pryor, SMITH, HELMS, MULLISS & MOORE, L.L.P., Charlotte, North Carolina, for Appellee Branch Banking; G. Robert Turner,. 111 Zipporah Marie Basile, HORACK, TALLEY, PHARR & LOWNDES,. Charlotte, North Carolina for Appellee Home Federal.

Unpublished opinions are not binding precedent in this circuit. See Local Rule

OPINION

PER CURIAM:

Bob McLemore & Co.. Inc. ("BMC") and its subsidiary companies (collectively,, the "McLemore group"). brought numerous claims against Home Federal Savings & Loan Association of Charlotte ("Home Federal") and Branch Bank & Trust Co. ("BB&T"). On the defendants' motions for summary judgment, the district court dismissed all claims against the defendants because the McLemore group had previously executed valid. written agreements releasing the defendants from all such claims. The McLemore group allege that they entered into those written releases under fraud and duress. We agree with the district court's finding that no fraud or duress occurred, and we affirm the judgment of the district court.

Robert V. McLemore is the president and sole shareholder of BMC, which is engaged in land development and home construction. BMC is the corporate parent of BMI Land Co., Inc. ("BMI Land"), Bob McLemore Homes, Inc. ("BMH"), Apple Homes, Inc. ("Apple Homes"), Apple Realty 2000, Inc. ("Apple Realty"), and MACO Homes, Inc. ("MACO Homes"). BMI Land is engaged in the purchase and development of tracts of land for home construction. BMH and Apple Homes are engaged in the construction of new homes. To induce customers to purchase new homes, McLemore created the "trading places" program; under this innovative program, a person who signed a construction contract for a new home with BMH or Apple Homes could trade in his existing home, which the McLemore group agreed to sell before the completion of the new home. Apple

Realty was created to list and sell the new home buyers' existing homes. If Apple Realty could not sell the existing home before the closing of the new home, MACO Homes would purchase the existing home and manage it as rental property.

Since 1972, the McLemore group worked closely with Home Federal to finance all phases of its construction operations. When the McLemore group wanted to begin development of a property, Home Federal would make the initial acquisition and development loan to BMI Land. When BMH or Apple Homes sold lots to individual home buyers, Home Federal would make the construction loans to McLemore and use the proceeds of those loans to pay down the initial acquisition and development loan. After construction of the new homes and upon closing with the home buyers, Home Federal made the permanent mortgage loans to the home buyers and used the proceeds to pay down the construction loans. If necessary, Home Federal made a second permanent mortgage loan to finance the sale of the customer's existing home either to a third-party or to MACO Homes. For many years, the McLemore group and Home Federal enjoyed an extremely close and very profitable financing relationship.

In 1988, the McLemore group proposed a drastic expansion in the scope of its business-from three to nineteen residential development projects. Home Federal approved the financing of the new construction and the McLemore group began purchasing and developing tracts of land.

In August 1989, however, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA'), which necessarily altered the McLemore group's financing relationship with Home Federal. FIRREA imposed a requirement on thrift institutions that prevented them from extending more than 15% of its unimpaired capital to a single

borrower. Although a thrift could seek and receive a waiver from the Office of Thrift Supervision ("OTS"), allowing it to loan up to 30% of its unimpaired capital to a single borrower, even the 30% limit restricted Home Federal's ability to continue financing the McLemore group's activities in the same manner as it had in the past.

Because Home Federal could no longer meet all of the McLemore group's financing needs, the McLemore group started doing business with BB&T, which had actively sought the McLemore group as a client. On March 28, 1990. BB&T executed a commitment to loan the McLemore group seven million dollars-one million dollars to BMI Land for land development, five million dollars to BMH and Apple Homes for homes construction. and one million dollars to MACO Homes for the purchase of rental homes. On August 7, 1991, BB&T and the McLemore group executed another commitment agreement that replaced the March 28, 1990 agreement. The terms of the August 7, 1991 agreement specified that the commitment to lend expired on September 1, 1992. Between March 1990 and June 1992, BB&T made loans to the McLemore group in accordance with the terms of the commitment agreements.

By June 1992, however. BB&T had determined that the financial condition of the McLemore group was deteriorating. On June 24. 1992, BB&T informed the McLemore group that it would not renew its commitment to provide financing beyond the September 1, 1992 expiration date of the August '7. 1991 agreement. BB&T and the McLemore group negotiated a schedule by which the McLemore group would repay its outstanding debts to BB&T. The parties executed a repayment agreement on October 5, 1992. By December 1992, the McLemore group had defaulted under the repayment agreement. The parties began negotiating a workout agreement for the McLemore group's defaults.

On April 8.1993, the McLemore group and BB&T executed a written workout agreement Under this agreement, BB&T accepted the deeds to certain properties and released the McLemore group from its indebtedness on those properties, thus avoiding the need for foreclosure proceedings. BB&T also extended some of the McLemore group's obligations and loaned additional money to pay certain liens and interest payments, thus giving the McLemore group an opportunity to work out the defaults on some of the properties. The McLemore group also released BB&T from any and all claims known or unknown, absolute or contingent, matured or unmatured that the McLemore group had against BB&T. During the course of the negotiations culminating in the workout agreement, the McLemore group was represented by counsel.

The McLemore group subsequently defaulted on the terms of the April 8, 1993 workout agreement, and BB&T foreclosed on the remaining properties.

Meanwhile, the McLemore group's financial position with Home Federal had also deteriorated. The McLemore group defaulted on its Home Federal loans in 1991. As it had done in the past, Home Federal worked with the McLemore group to bring the loans current. By June 1993, MACO Homes had defaulted on all its loans from Home Federal, as well as its loans from Southern National Bank of North Carolina ("Southem National") and United Carolina Bank ("UCB"). After a series of negotiations, the McLemore group, Home Federal, Southern National, and UCB entered an agreement, in which the three banks loaned MACO Homes additional funds to bring its loans current.

By July 1993, the McLemore group remained in default on the acquisition and development loans-to BMI Land and the home construction loans to BMH. The McLemore group and

Home Federal negotiated a workout agreement, which the parties executed on August 20. 1993. Under this agreement, Home Federal granted the McLemore group a six-month forbearance period on its defaults, giving the McLemore group a chance to sell properties and pay down its indebtedness. Home Federal also reduced the interest rate on certain loans during this forbearance period, and it forgave $390,206 in past due interest. The workout agreement also included the McLemore group's release from any claims that the McLemore group had against Home Federal. The McLemore group was represented by counsel when it negotiated and signed the workout agreement with Home Federal.

The McLemore group was unsuccessful in its efforts to sell properties and to pay down its outstanding debt. At the end of the forbearance period, the McLemore group's loans remained in default. Home Federal informed the McLemore group of its obligation under the workout agreement to deliver the deeds to Home Federal in lieu of foreclosure.

In response, the McLemore group filed a complaint against Home Federal and BB&T in North Carolina state court on February 22, 1994. When three of the McLemore group companies filed for bankniptcy, this action was removed to the United States Bankruptcy Court for the Western District of North Carolina. In two separate entries of proposed findings of fact and conclusions of law, the bankruptcy court recommended the entry of summary judgment on all claims against Home Federal and BB&T because, *inter alia,* the April 8, 1993 workout agreement and the August 20, 1993 workout agreement released Home Federal and BB&T from all of the claims brought by the McLemore group. The district court adopted verbatim the bankruptcy court's proposed findings of fact and conclusions of law. The McLemore group filed a timely appeal.

II.

We review the district court's grant of summary judgment de novo. *Evans v. Technologies Applications & Serv,. Co.,* 80 F.3d 954, 958 (4th Cir. 1996). Although the district court asserted several reasons for dismissing the McLemore group's claims, its primary reason was the existence of the release provisions in the April 8, 1993 and August 20, 1993 workout agreements. The McLemore group contends that the district court should not have enforced the release provisions for two reasons: first. the McLemore, group signed the workout agreements under dures s. and second, the McLemore group was defrauded into signing the workout agreements. We consider each arguement in turn.

A. Duress

Under North Carolina law, a person who enters into a contract under duress can avoid his obligations under that contract. Duress exists "where one by the unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Adder v,. Holman & Moody, Inc.,* 219 S.E.2d 19O, 194 (N.C. 1975). Although duress may arise from the wrongful use of physical force or threats of physical force, it can also arise from the wrongful exertion of economic pressure. However, not every imbalance in economic power creates a situation of economic duress. Economic duress anses from the illegitimate use of economic power outside the bounds of a contract or the law. *See Rose v. Vulcan Materials Co.,* 194 S.E.2d 521, 536 (N.C. 1973). Thus, the mere threat by one party to breach a contract, though wrongful, does not establish economic duress. Id. Economic duress occurs when a party's wrongful action forces another to make a contractual promise, or else suffer irreparable injury to his business. See *id.* In addition, the

wronged party must have "no immediate and adequate remedy in the courts" that would enable him to resist the other's demands. Id.

The McLemore group contends that it signed the workout agreements under duress. We disagree for two reasons. First, neither BB&T nor Home Federal exerted any undue economic pressure on the McLemore group. The threat of foreclosure certainly pressured the McLemore group into signing the workout agreements, but BB&T and Home Federal had the legal right to threaten foreclosure because the McLemore group defaulted on its loans. Neither BB&T nor Home Federal created the McLemore group's weak financial position, thus forcing to negotiate workout agreements from a weak bargaining position.*

Second, the undisputed evidence in the record demonstrates that, as an alternative to signing the workout agreements, the McLemore group could have sought the protection of the bankruptcy code. Instead, and with the hopes of saving its business, the McLemore group chose to enter workout agreements that released BB&T and Home Federal from any actions it could pursue against them. Because the McUmore group had an alternative to signing the workout agreements, it cannot argue that it entered those agreements under duress.

*McLemore group alleges that Home Federal created artificial defaults by deliberately misapplying the McLemore groups loan payments instead of usingpayments first to pay off any interest due and then to pay down principal. Home Federal began applying the entire loan payment to pay down principal, thus allowing the McLemore group to fall behind on interest payments. The McLemore group has supported its allegations with verified affidavits, and we do not resolve this factual dispute at this stage of the proceedings

Nonetheless, such misconduct, even if it occurred, would not establish that the McLemore group signed the work-out agreement with Home Federal under duress. If Home Federal had misapplied loan payments, the McLemore group either knew or should have known of this fact before it signed the work-out agreement. Although the McLemore group trusted Home Federal to handle the accounting of its loan payments, it had a duty to make at least some inquiries to ensure that Home Federal kept the books correctly. Certainly by the time Home (*)Federal threatened foreclosure proceedings, the McLemore group should have investigated to ensure that Home Federal had correctly applied the loan payments to its debts. By signing the workout agreement, the McLemore group chose to release Home Federal from its misconduct in exchange for a forbearance period to cure its loan defaults.

B. Fraud

Next, the McLemore group contends that BB&T and Home Federal, on several occasions, represented to it that BB&T and Home Federal were not planning a merger. The McLemore group alleges B&T and Home Federal began merger negotiations as far back as 1989, culminating in a merger agreement at the end of 1993. The McLemore group also alleges that Home Federal represented to the McLemore group that the OTS had denied Home Federal a 30% waiver in 1992, when in fact Home Federal never applied for such a waiver. Furthermore, the McLemore group alleges that Home Federal misapplied the McLemore group's payments, causing the McLemore group to fall behind in its interest payments and to default
on its loans. The McLemore group argues that it would not have signed the workout agreements if it had known about the defendant's fraud.

Although the McLemore group's allegations may serve as the basis of fraud actions against BB&T and Home Federal, the McLemore group released the defendants from such actions in the workout agreements. There is no evidence in the record that BB&T and Home Federal fraudulently induced the McLemore group to sign the release agreements. With regard to each of the two workout agreements. the district court found that the McLemore group actively participated in the negotiations, reviewed drafts of the agreement. and made changes to the agreement. The McLemore group was represented by counsel throughout the negotiations and the signing of the agreements. The district court found that the McLemore group knew that each workout agreement contained a release provision when it signed the agreement.

Like the district court. we conclude that the undisputed facts demonstrate that the McLemore group was not induced by fraud to enter into the workout agreements with BB&T and Home Federal.

We agree with the district court that the release provision in the workout agreements is a valid defense against all of the McLemore group's claims against BB&T and Home Federal. Therefore. we need not consider the McLemore group's other arguments. We affirm the district court's entry of summary judgment in favor of the defendants on all claims.

AFFIRMED

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FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: BRANCH BANKING AND TRUST COMPANY

IN THE UNITED STATES DISTRICT COURT

Civil Action No.395 mc 4 mu

IN RE:
MACO HOMES, INCORPORATED
Case No. C-B-94-30421 (Chapter 11)
Debtor I.D. No. 56-1064881
Adversary Proceeding No.
94-3108
BOB MCLEMORE &CO.,INC.,BOB MCLEMORE HOMES, INC.,
APPLE HOMES, INC., APPLE REALTY 2000, INC., BMI LAND CO., INC., AND MACO HOMES, INC., CORPORATIONSP
Plaintiffs,

VS.
BRANCH BANKING &TRUST CO.,
Defendant

and HOME FEDERAL SAVING AND LOAN ASSOCIATION OF CHARLOTTE
Defendant and Third Party Plaintiff
VS.

ROBERT V. MCLEMORE,

Third-Party Defendant.

FINDINGS OF FACT AND CONCLU-SIONS OF LAW

THIS MATTER came on before the Court upon the Defendant Branch Banking and Trust Company's Motion for Summary

Judgment.The Court has reviewed the Recommended Findings of Fact and Conclusions of Law submitted to it by the Bankruptcy Court, Pursuant to the provisions of 28 U.S.C. 157(c)(1) and Bankruptcy Rule 9033. The Court is in agreement with the Recommended Findings of Fact and Conclusions of Law and hereby adopts the Recommended Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

The Court finds that the following facts are undisputed and are dispositive of the Motion before the Court.

1. Each of the plaintiffs are corporations which are engaged in some aspects of the- residential real estate business. Bob McLemore & Co., Inc. ("BMC") owns 100% of the outstanding capital stock of each of the other plaintiffs. Robert V. McLemore ("Mr. McLemorell) is the president and sole shareholder of BMC. Bob McLemore Homes, Inc. ("BMH") is primarily engaged in the home construction business. Apple Homes, Inc. ("Apple Homes") is primarily engaged in the home construction business. Apple Realty 2000, Inc. ("Apple Realty") is primarily engaged in the business of selling homes and is a debtor in a Chapter 11 bankruptcy proceeding pending in this Court. BMI Land Co., Inc. (BMI) is primarily engaged in the business of purchasing and selling lots and is a debtor in a Chapter 11 bankruptcy proceeding pending in this Court. Maco Homes, Inc. ("MACO") is primarily engaged in the purchase and rental of homes and is a debtor in a Chapter 11 bankruptcy proceeding pending in this Court. The plaintiffs in this adversary proceeding are hereinafter referred to as the "McLemore Group".

2. On or about March 28, 1990, BB&T, BMC, BMH, Apple Homes, BMI and MACO signed a written Commitment Letter/Loan Agreement (the "March 28, 1990 Agreement"). The Agreement specified the terms and conditions of BB&Tls commitment to make loans-to the

McLemore Group.

3. On or about July 6, 1990, a written Commitment Modification (the "July 6, 1990 Modification") was signed by BB&T and MACO. The July 6, 1990 Modification modified the March 28, 1990 Agreement and specified the terms and conditions of the loans that were to be made by BB&T to MACO.

4. On or about August 7, 1991, BB&T, BMC, BMH, Apple Homes, BMI and Apple Realty signed a written Commitment Letter/Loan Agreement (the "August 7, 1991 Agreement"). The August 7, 1991 Agreement replaced the March 28, 1990 Agreement and committed BB&T to provide financing to certain of the McLemore Group entities. The August 7, 1991 Agreement specified all of the terms and conditions of the loans that were to be made by BB&T to the McLemore Group. The August 7, 1991 Agreement specified that the commitment to lend expired on September 1, 1992.

5. The McLemore Group contends that BB&T orally agreed to a ten to fifteen year lending relationship with the McLemore Group. It is undisputed that there was no written agreement committing BB&T to such a relationship. on the contrary, the written lending commitments between BB&T and the McLemore Group contained specific dates when BB&Tls commitment to lend to the McLemore Group expired. The last agreement, the August 7, 1991 Agreement, specified that the commitment to lend would expire on September 1, 1992. It is further undisputed that there was no agreement between BB&T and the McLemore Group on the essential terms and conditions (such as the amount of the loans, the interest rate or the repayment terms) of any long term lending relationship that the McLemore Group contends existed.

6. Between March of 1990 and June of 1992, BB&T made loans to various entities of the McLemore Group in accordance with the terms of the written lending agreements between BB&T and the McLemore Group. The terms of the notes that were executed at the closing of each of these loans

were consistent with the terms of the written agreements between BB&T and the McLemore Group.

7. The written commitment letters and the notes and other loan closing documents entered between BB&T and the McLemore Group embody the sole and integrated agreement of the parties with respect to the loans between BB&T and the McLemore Group.

8. On or about June 24, 1992, representatives of BB&T met with Mr. McLemore and notified the McLemore Group that BB&T would not extend its commitment to provide financing to the McLemore Group past the September 1, 1992 expiration date specified in the August 7, 1991 Agreement.

9. After the June 24, 1992 meeting, BB&T and the McLemore Group engaged in negotiations concerning a repayment schedule by which the McLemore Group would repay its outstanding debts to BB&T. Many of the notes that the McLemore Group had given to BB&T were scheduled to mature and be payable in full at various times in 1992. On October 5, 1992, representatives of the McLemore Group and their attorney and BB&T and its attorney met to finalize the terms of a repayment agreement. On October 5, 1992, BB&T and each of the McLemore Group entities executed an Agreement (the "October 5, 1992 Agreement") which provided a schedule for payment of the outstanding obligations of the McLemore Group to BB&T. The October 5, 1992 Agreement embodied the sole and integrated agreement of BB&T and the McLemore Group with respect to the repayment terms.

10. In December 1992, the McLemore Group defaulted under the terms of the October 5, 1992 Agreement by failing to make the principal and interest payments due.

11. In early 1993, a series of negotiations occurred between BB&T and the McLemore Group concerning a potential workout of the defaults under the October 5, 1992 Agreement.

12. On April 8, 1993, the McLemore Group and BB&T executed a written workout agreement (the "April 8,

1993 Agreement"). At the time the April 8, 1993 Agreement was executed, the McLemore Group was represented by an attorney. Pursuant to the terms of the April 8, 1993 Agreement, the McLemore Group released BB&T from any and all claims known or unknown, absolute or contingent, matured or unmatured that the McLemore Group, individually or as a group, had against BB&T. The transactions contemplated by the April 8, 1993 Agreement closed and the conditions for the release to become effective occurred. Pursuant to the terms of the April 8, 1993 Agreement, BB&T accepted deeds to certain properties and released the McLemore Group from their obligations to pay notes which had a total outstanding principal balance of approximately $2,985,000. The April 8, 1993 Agreement embodied the sole and integrated agreement of BB&T and the McLemore Group with respect to the workout.

13. The scope of the release of BB&T that is contained in the April 8, 1993 Agreement encompasses all the claims asserted in this adversary proceeding.

14. At the time of the April 8, 1993 Agreement was executed, the alleged claims upon which the McLemore Group bases the allegations of the Amended Complaint had occurred and the McLemore Group was aware of the alleged facts upon which the McLemore Group bases the allegations of the Amended Complaint.

15. The McLemore Groun subsequently defaulted under the terms of the April 8, 1993 Agreement by failing to pay BB&T certain funds to which BB&T was entitled and by allowing liens to be filed against properties on which BB&T held a lien.

16. The McLemore Group contends that the McLemore Group was under duress when the McLemore Group signed the April 8, 1993 Agreement. The Court finds that the evidence in the record, taken in the light most favorable to the plaintiff, does not create an issue of fact concerning duress. The McLemore Group was represented by counsel at the time the April 8, 1993 Agreement was signed. The McLemore

Group was aware of all of the alleged facts upon which they now rely as the basis for their claims against BB&T. At the time the April 8, 1993 Agreement was entered, the McLemore Group had alternatives to signing the April 8, 1993 Agreement, including the filing of a bankruptcy petition on behalf of one or more of the McLemore Group entities or the filing of a lawsuit against BB&T. At the time the April 8, 1993 Agreement, which contains the release, was entered, the McLemore Group had adequate and immediate remedies available in the courts as alternatives to entering into the April 8, 1993 Agreement.

17. The execution of the April 8, 1993 Agreement was a knowing and voluntary act by the McLemore Group, for which it received good and valuable consideration.

18. On April 27, 1993, BMI and Apple Realty executed and delivered to BB&T a promissory note in the original principal amount of $350,000 (the "April 27, 1993 Note") . BMI and Apple Realty failed to pay the payments due under the terms of the April 27, 1993 Note. BMI and Apple Realty are indebted to BB&T in the amount of $278,250.85, plus interest thereon from March 31, 1994, pursuant to the terms of the April 27, 1993 Note.

19. BB&T is entitled to recover its reasonable attorneys' fees pursuant to the terms of the April 27, 1993 Note and N.C. Gen. Stat. S 6-21.2.

20. On or about October 27, 1992, BMC, BMH, Apple Homes and MACO executed and delivered to BB&T written guaranty agreements guaranteeing BMI's obligations to BB&T and Apple Realty's obligations to BB&T.

21. BMC, BMH, Apple Homes and MACO are indebted to BB&T in the amount of $278,250.85 plus interest thereon from March 31, 1994, pursuant to the terms of the written guaranty agreements and the April 27, 1993 Note.

22. BB&T is entitled to recover its reasonable attorneys' fees pursuant to the terms of the guaranty agreements and N.C. Gen. Stat. § 6-21.2.

23. On or about September 30, 1991, Apple Realty

executed and delivered to BB&T a promissory note in the original principal amount of $99,000.00 (the "September 30, 1991 Note"). Apple Realty failed to make the payments due under the terms of the September 30, 1991 Note. Apple Realty is indebted to BB&T in the amount of $101,074.85, plus interest thereon from March 31, 1994 pursuant to the terms of the September 30, 1991 Note.

24. BB&T is entitled to recover its reasonable attorneys' fees pursuant to the terms of the September 30, 1991 Note and *N.C.* Gen. Stat. S 6-21.2.

25. On or about October 27, 1992, and pursuant to the terms of the October 5, 1992 Agreement, BMC, BMH, Apple Homes, BMI and MACO executed and delivered to BB&T written guaranty agreements guaranteeing Apple Realty's obligations to BB&T.

26. BMC, BMH, Apple Homes, BMI and MACO are indebted to BB&T in the amount of $101,074.85, plus interest thereon from March 31, 1994, pursuant to the terms of the written guaranty agreements and the September 30, 1991 Note.

27. BB&T is entitled to recover its reasonable attorneys, fees pursuant to the terms of the written guaranty agreements and *N.C.* Gen. Stat. S 6-21.2.

28. This Court has previously granted BB&T relief from the automatic stay to foreclose on the mortgage that secures the September 30, 1991 Note. Upon the completion of the foreclosure proceeding, the net amount of the foreclosure proceeds that are paid to BB&T directly, or by credit bid, should be credited against the indebtedness due under the September 30, 1991 Note.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court

makes the following Conclusions of Law.

1. BB&T is entitled to summary judgment dismissing the claims against BB('XT in this adversary proceeding, with prejudice, because the undisputed, material facts show that the McLemore Group executed a valid and enforceable written agreement releasing BB&T from all the claims asserted in this adversary proceeding. As a matter of law, the release is a complete bar to the plaintiff's claims.

2. BB&T is entitled to summary judgment on the breach of the alleged oral contract to lend claim because the undisputed facts show that there was no written commitment to lend signed by BB&T. Section 22-5 of the North Carolina General Statutes requires that such commitments be in writing and signed by the party to be bound to be enforceable. N.C. Gen. Stat. S 22-5 (1993).

3. BB&T is entitled to summary judgment on the breach of the alleged oral contract to lend claim because the essential terms of the alleged contract were not agreed to by the parties. Accordingly, there was no agreement and, therefore, no breach. DeMaine v. Bank One, Akron, 904 F.2d 214 (4th Cir. 1990); MCB, Ltd. v. McGowan, 86 N.C. App. 607, 359 S.E. 2d 50 (1987); Gray v Hacrer, 69 N.C. App. 331, 317 S.E. 2d 59 (1984).

4. BB&T is entitled to summary judgment on the breach of the alleged oral contract to lend claim because all agreements and negotiations between BB&T and the McLemore Group were merged into the March 28, 1990 Agreement, the July 6, 1990 Modification and the August 7, 1991 Agreement at the time those agreements were executed.

5. BB&T is entitled to recover the sum of $278,250.85, plus interest thereon from March 31, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from the McLemore Group pursuant to the terms of the April 27, 1993 Note and the related guaranty agreements.

6. BB&T is entitled to recover the sum of $101,074.85, plus interest thereon from March 31, 1994, plus attorneys' fees, in the amount of f if teen percent (15%) of the outstanding balance, from the MeLemore Group pursuant to the terms of the September 30, 1991 Note and the related guaranty agreements.

7. Any net amount that BB&T receives from the foreclosure on the mortgage that secures the September 30, 1991 Note should be credited against the judgment that this Court recommends on that note and the related guaranty agreements.

8. BB&T is entitled to have the claims against it in this adversary proceeding dismissed, with prejudice.

9. BB&T is entitled to recover its costs from the plaintiffs.

10. Pursuant to Rule 7054 of the Federal Rules of Bankruptcy Procedure and Rule 54 of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay of entry of an Order granting Branch Banking and Trust Company's Motion for Summary Judgment and expressly directs the entry of Judgment as provided for in these Findings of Fact and Conclusions of Law and the separate Order and Judgment that this Court shall enter contemporaneously with these Findings of Fact and Conclusions of Law.

Dated this the26TH Day of SEPTEMBER, 1995

United States District Court Judge
Graham C Mullen

ORDER AND JUDGMENT RE: BRANCH BANKING &TRUST

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No.3:95 MU 4 MU

IN RE: CASE No. C-B-94-30421
MACO HOMES, INCORPORATED(CHAPTER 11)
Debtor Aversary Proceeding
I. D. No. 56 1064881- 94-3108

BOB MCLEMORE & CO-, INC., BOB MCLEMORE HOMES, INC., APPLE HOMES, INC., APPLE REALTY 2000, INC., BMI LAND CO., INC., and MACO HOMES, INC-,corporations,

Plaintiffs,
VS.

ORDER AND JUDGMENT

BRANCH BANKING & TRUST Co.,
Defendant

and HOME FEDERAL SAVINGS SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE,
Defendant and Third-Party Plaintiff
vs,
ROBERT V. MCLEMORE
Third-Party Defendant-

THIS MATTER came before the Court upon the Motion for Summary Judgment filed by Branch Banking and Trust Company.

This Court has considered the record, and the Recommended Findings of Fact and Conclusions of Law submitted by the Bankruptcy Court. This Court is of the opinion that it should adopt the Findings of Fact and Conclusions of Law submitted by the Bankruptcy Court and that the Motion should be allowed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That the Motion of Branch Banking and Trust Company for summary judgment is hereby granted.

2. That the claims in the adversary proceeding against Branch Banking and Trust Company are hereby dismissed, with prejudice.

3. That Branch Banking and Trust Company have and recover of the Plaintiffs, jointly and severally, the sum of $278,250,85, plus interest thereon from March 31, 1994 at the rate specified in the April 27, 1993 Note, until paid.

4. That Branch Banking and Trust Company have and recover of the Plaintiffs, jointly and severally, its attorneys' fees in the amount of $41,737.62 in accordance with the terms of the April 27, 1993 Note, the related guaranty agreements and N.C. .Gen. Stat. 6-21.2.

5. That Branch Banking and Trust Company have and recover of the Plaintiffs, jointly and severally, the sum

of $101,074.85, plus interest thereon from March 31, 1994 until paid, at the rate specified in the September 30, 1991 Note.

6. That Branch Banking and Trust Company have and recover of the Plaintiffs, jointly and severally, its attorneys' fees in the amount of $15,161.22, pursuant to the terms of the September 30, 1991 Note, the related guaranty agreements and N.C. Gen. Stat. S 6-21.2.

7. That the Clerk shall tax all costs against the Plaintiffs.

Dated this the 10th day of October, 1995

GRAHAM C MULLEN
United States District Court Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: HOME FEDERAL SAVINGS &LOAN ASSOC. OF CHARLOTTE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION
IN RE:
MACO HOMES, INCORPORATED,
Debtor. I.D.NO. 56-1064881

CASE NO. 94-30421 ADVERSARY PROCEEDING

CHAPTER 11
NO. 94-3108

BOB McLEMORE AND CO., INC., et al.,
Plaintiffs,
BRANCH BANKING & TRUST CO.,
Defendant,
and HOME FEDERAL SAVINGS & LOAN ASSOCIAION OF &LOAN ASSOCIATION OF CHARLOTTE
Defendant & Third-Party Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

vs.
ROBERT V. MCLEMORE
Third-Party Defendant

This matter is before the undersigned United States District Court Judge pursuant to the provisions of 28 U.S.C. § 157(c)(1) and Bankruptcy Rule 9033 upon the Recommendations of bankruptcy judge Marvin R. Wooten as to findings of fact, conclusions of law and judgment upon Motion for Summary Judgment (The Motion) by the defendant and third-party plaintiff Home

Federal Savings & Loan Association of Charlotte, and after consideration of the entire record this Court finds that the following facts are undisputed and are dispositive of the Motion' before the Court:

FINDINGS OF FACT

1. Each of the plaintiffs are affiliated and interrelated corporations which are engaged in some aspect of the residential real estate business. Bob McLemore and Company, Inc. ("BMC") owns one hundred per cent (100%) of the outstanding capital stock of each of the other plaintiffs. Robert V. McLemore ('McLemore") is the president and sole shareholder of BMC. BMI Land Co., Inc. ("BMI") is primarily involved in the purchase of land to be used for new home construction and subdivision planning. Bob McLemore Homes, Inc. ('BMH') is primarily engaged in new home construction. Apple Homes, Inc. ("Apple Homes") is primarily engaged in new home construction. Apple Realty 2000, Inc. ('Apple Realty') was organized to list and sell the new home buyers' existing homes. Apple Realty was involved in the "trading places' trade-in program; whereby, as soon as a construction contract for a new home was signed with BMH or another McLemore Group entity, the new home buyer would have a binding contract with Apple Realty requiring a member of the McLemore Group to buy the existing home if it did not sell prior to the closing on the new home. MACO Homes, Inc. ("MACO") was organized to manage some of the homes described above, which did not sell prior to closing, as rental homes. The plaintiffs in this proceeding are also referred to collectively as the 'McLemore Group". McLemore, in addition to being the president and sole shareholder of BMC, is also the

president, chairman of the board of directors and chief executive officer of each of the above entities.

1. Home Federal's Motion for Summary Judgment is based upon certain defenses that were pled in the Answer, Counterclaim and Third-Party Complaint filed by HomeFederal, including the defense that the plaintiffs released Home Federal from all the claims asserted in this proceeding, the defense that the plaintiffs' claims are barred by the applicable statute of frauds and the defense that plaintiffs' claims are barred by the applicable statute of limitations. This Court concludes that all the plaintiffs claims against Home Federal have been released pursuant to the terms of a written release and, therefore, that all the claims against Home Federal should be dismissed with prejudice. However, this Court also finds that a number of plaintiffs' claims fail, additionally, due to other applicable North Carolina law. This Court will therefore make findings and conclusions concerning the other grounds for summary judgment on specific claims that were raised in the Motion so that the district court may review the Court's Proposed Recommended Findings of Fact and Conclusions of Law and the Recommended Order and Judgment.

2. The defendant and third-party plaintiff, Home Federal, is a federal savings and loan association.

3. A lender borrower relationship has existed between Home Federal and the Mclemore Group from as early as 1970

4. From May 31, 1985 to July 30, 1992 Home Federal made at least twelve loans to MACO as evidenced by promissory notes which were executed and delivered to Home Federal by the McLemore Group.

5. As of June, 1993, the McLemore Group had defaulted on all of the above MACO loans.

6. Prior to June 29, 1993, a series of negotiations occurred

among the McLemore Group, Home Federal, Southern National Bank of North Carolina ('Southern National") and United Carolina Bank ("UCB") (two other entities which owned and held defaulted MACO notes) concerning a potential work-out of the MACO defaults.

7. On June 29, 1993, the McLemore Group, Home Federal, Southern National, and UCB executed a written work-out agreement (the 'Multi-Party Agreement'). The Multi-Party Agreement recited that "the borrower is indebted to Southern National, UCB and Home Federal, respectively, in amounts not less than those set forth in exhibits A, B and C, and there are no defenses, set-offs, or counterclaims to the payment of said indebtedness".

8. In 1991 loans from Home Federal to BMI and other McLemore Group entities went into default. Following this, for over two and one-half years, Home Federal worked with the McLemore Group to bring the McLemore Group loans current.

9. As of July, 1993, interest remained in arrears on numerous BMI and BMC loans and, pursuant to the applicable notes and deeds of trust, these BMI and BMC loans were in default.

10. Prior to July, 1993, and up until August, 20, 1993, a series of negotiations occurred between Home Federal and the McLemore Group concerning a potential workout of the BMI and BMC defaults.

11. On August 20, 1993, the McLemore Group and Home Federal executed a written work-out agreement (the 'Agreement'). Pursuant to the terms of the Agreement, the McLemore Group released Home Federal from any defenses, set-offs, offsets, equities, counterclaims or other claims, legal or equitable that the McLemore Group, individually or as a group, had against Home Federal. Further, pursuant to the Agreement, Home Federal granted the McLemore Group a six month forbearance period during which Home Federal would refrain from exercising its default remedies and during which time the McLemore Group could sell properties and pay down

loans. The McLemore Group was granted a reduction of interest throughout the forbearance period. In addition, the McLemore Group was offered the possibility of $390,206.00 worth of interest being forgiven (said amount of interest to be forgiven as long as no default occurred under the Agreement). Finally, as an additional inducement to the McLemore Group to sell properties and pay down loans quickly, if the McLemore Group could pay all of the loans in full prior to January 15, 1994, Home Federsi would accept up to $500,000.00 less than the total amount due. The Agreement embodied the sole and integrated agreement of Home Federal and the McLemore Group with respect to the workout.

12. The McLemore Group was unsuccessful in its efforts to sell the property in order to pay off or refinance the loans and was otherwise unsuccessful in its attempts to comply with the terms of the Agreement. As a result, the forbearance period expired with the McLemore Group still in default.

13. At the time the Agreement was executed, the McLemore Group was aware of a number of the alleged claims upon which the McLemore Group based the allegations of the Amended Complaint.

14. The scope of the release of Home Federal that is contained in the agreement encompasses all the claims asserted in this adversary proceeding by the plaintiffs against Home Federal.

15. The McLemore Group contends that the McLemore Group was under duress when the Agreement was executed. The Court finds that the evidence in the record, taken in the light most favorable to the plaintiffs, does not create an issue of fact concerning duress. The McLemore Group actively participated in written negotiations with respect to the Agreement. On July 14, 1993 the McLemore Group's "work-out specialist" (Andrew Garverick) sent a letter to Home Federal outlining a proposal for dealing with the BMI/BMC defaults. Home Federal adopted the basic premise of this letter (a six month forbearance period which would allow the McLemore Group

additional time to sell the properties and pay down the loans) and sent a proposed agreement to the McLemore Group prior to August 1, 1993. Home Federal's proposed agreement was reviewed by McLemore personally, in consultation with Garverick. Legal counsel was available to the McLemore Group at all times prior to and at the time of the Agreement's execution. McLemore, himself, made certain proposed handwritten changes to the Agreement. On August 16, 1993 McLemore sent a draft, with his proposed handwritten changes, to Home Federal. Some of the changes requested by McLemore were agreed to by Home Federal and were incorporated into the final version of the Agreement which was executed by the parties on August 20, 1993. In February of 1993, the McLemore Group had previously drafted an "outline of complaint"which contained claims almost identical to those in the plaintiff's amended complaint and which demonstrated that at the time the Agreement was signed plaintiffs were aware of the alleged existence of claims against Home Federal. At the time the Agreement was executed the McLemore Group had alternatives to entering the Agreement, including the filing of a bankruptcy petition on behalf of one or more of the McLemore Group entities or the filing of a lawsuit against Home Federal. At the time the Agreement, which contains the release, was entered, the McLemore Group had adequate and immediate remedies available to it in the courts as alternatives to entering into the Agreement.

16. The McLemore Group contends that it was induced by fraud to enter into the Agreement. The Court finds that the evidence in the record, taken in the light most favorable to the plaintiffs, does not create an issue of fact concerning fraud. The McLemore Group actively participated in negotiations for the Agreement; outlined the basic premise of the Agreement; reviewed Home Federal's draft of the Agreement (which included a release); made proposed changes to the Agreement; and had available to it legal counsel at all times prior to and at the time of the Agreements execution. It is undisputed that the plaintiffs clearly knew the release was contained in the

Agreement, had read it, understood it, and were in no way misled as to its presence in the Agreement.

17. The execution of the Agreement was a knowing and voluntary act by the McLemore Group, for which it received good and valuable consideration.

18. The McLemore Group has alleged the existence of numerous oral commitments to lend, including a 1988 oral commitment to lend (the '1988 Oral Commitment'), which were allegedly breached by Home Federal. The McLemore Group has also alleged the existence of two written loan commitments to the McLemore Group which it claims were breached by Home Federal. The McLemore Group points to a March 26, 1991 letter from H. Joe King (President of Home Federal) to McLemore and the Multi-Party Agreement as evidence of these written commitments.

19. With respect to any of the alleged oral commitments, including the alleged 1988 Oral Commitment, there is no agreement as to the amount of any loans, repayment schedules, dates on which loans were to be made, or interest rates.

20. The Multi-Party Agreement contains no repayment schedule or interest rates.

21. The March 26, 1991 letter contains no repayment schedule, interest rates,on which the alleged loan was to be made. The March 26, 1991 letter does contain a recitation that appraisals of the value of, and the approval of the value of, certain McLemore Group properties were required prior to the extension of any loan by Home Federal. The letter further recites that no loan to the McLemore Group could be extended at that time due to Office of Thrift Supervision regulatory restrictions.

22 The McLemore Group contends that all of its claims were filed within the applicable Statute of Limitations however, statements contained in McLemore's and Garverick's deposition, as well as other documents in the record, indicate that certain claims have accrued prior to February 22, 1991 and February 22, 1990 (which are applicable Statute of Limitations

bar dates).

The following Findings of Fact numbered 21 through 66 relate to loans from Home Federal to members of the McLemore Group. References to "claim numbers" in these Findings of Fact, and subsequent Conclusions of Law, refer to the claim numbers on the schedule attached as Exhibit A to Home Federal's Answer, Counterclaim and Third-Party Complaint and to the schedule attached as Exhibit 1 to the Affidavit of Gregory L. Stanley.

21. Claim 1. On December 14, 1988, BMH executed and delivered to Home Federal a promissory note in the original principal amount of $172,890.00 (the "December 14, 1988 Note'). BMH failed to pay the payments due under the terms of the December 14, 1988 Note. BMH was indebted to Home Federal in the amount of $249,370.94, plus interest thereon ($53.85 per diem) from December 21, 1994, pursuant to the terms of the December 14, 1988 Note. The December 14, 1988 Note provides for Home Federal's recovery of attorneys' fees.

22. Claim 2. On June 29, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $88,400.00 (the 'June 29, 1989 Note"). BMC failed to pay the payments due under the terms of the June 29, 1989 Note. BMC is indebted to Home Federal in the amount of $95,771.19, plus interest thereon ($23.01 per diem) from December 21, 1994, pursuant to the terms of the June 29, 1989 Note. The June 29, 1989 Note provides for Home Federal's recovery of attorneys' fees.

23. Claim 3. On May 26, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $99,000.00 (the 'May 26, 1989 Note"). BMC failed to pay the payment due under the May 26, 1989 Note. BMC is indebted to Home Federal in the amount of $107,300.37 plus interest thereon ($27.05 per diem) from December 21, 1994, pursuant to the terms of the May 26, 1989 Note. The May 26, 1989 Note provides for Home Federal's recovery of attorneys' fees.

24. Claim 4. On January 27, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $51,600.00 (the 'January 27) 1989 Note'). BMC failed to pay the payments due under the terms of the January 271, 1989 Note. BMC is indebted to Home Federal in the amount of $55,396.88, plus interest thereon ($13.98 per diem) from December 21, 1994, pursuant to the terms of the - January 27, 1989 Note. The January 27, 1989 Note provides for Home Federal's recovery of attorneys' fees.

25. Claim 5. On January 17, 1991, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $72,000.00 (the "January 17, 1991 Note"). BMC failed to pay the payments due under the terins of the January 17, 1991 Note. BMC is indebted to Home Federal in the amount of $83,388.46, plus interest thereon ($18.75 per diem) from December 21, 1994, pursuant to the terms of the January 17, 1991 Note. The January 17, 1991 Note provides for Home Federal's recovery of attorneys' fees.

26. Claim 6. On May 10, 1990, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $85,500.00 (the 'May 10, 1990 Note'). BMC failed to pay the payments due under the terms of the May 10, 1990 Note. BMC is indebted to Home Federal in the amount of $102,263.61, plus interest thereon ($23.82 per diem) from December 21, 1994, pursuant to the terms of the May 10, 1990 Note. The May 10, 1990 Note provides for Home Federal's recovery of attorneys' fees.

27. Claim 7. On November 28, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $67,000.00 (the 'November 28, 1989 Note'). BMC faided to pay the payments due under the terms of the November 28, 1989 Note. BMC is indebted to Home Federal in the amount of $78,676.24, plus interest thereon ($18.00 per diem) from December 21, 1994, pursuant to the terms of the November 28, 1989 Note. The November 28. 1989 Note provides for Home Federal's recovery of attorn[illegible]s' fees.

28. Claim 8. On May 31, 1990, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $88,800.00 (the 'May 31, 1990 Note'). BMC failed to pay the payments due under the terms of the May 31, 1990 Note. BMC is indebted to Home Federal in the amount of $104,935.10, plus interest thereon ($24.23 per diem) from December 21, 1994, pursuant to the terms of the May 31, 1990 Note. The May 31, 1990 Note provides for Home Federal's recovery of attorneys' fees.

29. Claim 9. On June 15, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $82,000.00 (the 'June 15, 1989 Note'). BMC failed to pay the payments due under the terms of the June 15, 1989 Note. BMC is indebted to Home Federal in the amount of $88,028.68, plus interest thereon ($21.34 per diem) from December 21, 1994, pursuant to the terms of the June 15, 1989 Note. The June 15, 1989 Note provides for Home Federal's recovery of attorneys' fees.

30. Claim 10. On September 29, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $110,000.00 (the 'September 29, 1989 Note"). BMC failed to pay the payments due under the terms of the September 29, 1989 Note. BMC is indebted to Home Federal in the amount of $117,782.42, plus interest thereon ($27.39 per diem) from December 21, 1994, pursuant --to the terms of the September 29, 1989 Note. The September 29, 1989 Note provides for Home Federal's recovery of attorneys' fees.

31. Claim 11. On April 11, 1990, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $165,500.00 (the 'April 11, 1990 Note'). BMC failed to pay the payments due under the terms of the April 11, 1990 Note. BMC was indebted to Home Federal in the amount of $168,066.62, plus interest thereon ($44.68 per diem) from December 21, 1994, pursuant to the terms of the April 11, 1990 Note. The April 11, 1990 Note provides for Home Federal's recovery of attorneys' fees.

32. Claim 12. On May 22, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $65,200.00 (the "May 22, 1989 Note"). BMC failed to pay the payments due under the terms of the May 22, 1989 Note. BMC is indebted to Home Federal in the amount of $70,737.69, plus interest thereon ($17.84 per diem) from December 21, 1994, pursuant to the terms of the May 22, 1989 Note. The May 22, 1989 Note provides for Home Federal's recovery of attorneys' fees-.

33. Claim 13. On November 29, 1989, BMC executed and delivered to Home Federal a promissory note in the principal amount of $150,800.00 (the November 29, 1989 Note)BMC failed to pay the payments due under the terms ofthe November 29, 1989 Note. BMC was indebted to Home Federal in the amount of $149,953.01, plus interest thereon ($38.34 per diem) from December 21, 1994, pursuant to the terms of the November 29, 1989 Note. The November 29, 1989 Note provides for Home Federal's recovery of attorneys' fees.

34. Claim 14. On March 30, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $95,900.00 (the 'March 30, 1989 Note'). BMC failed to pay the payments due under the terms of the March 30, 1989 Note. Since its default, however, BMC's obligations under the March 30, 1989 Note have been satisfied and BMC is no longer indebted to Home Federal for the March 30, 1989 Note.

35. Claim 15. On April 11, 1990, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $47,400.00 (the 'April 11, 1990 Note"). BMC failed to pay the payments due under the terms of the April 1 1, 1990 Note. Since its default, however, BMC's obligations under the April 11, 1990 Note have been satisfied and BMC is no longer indebted to Home Federal for the April 11, 1990 Note.

36. Claim 16. On May 22, 1989, BMC executed and delivered to Home Federal a promissory note in the original

principal amount of $63,600.00 (the 'May 22, 1989 Note"). BMC failed to pay the payments due under the terms of the May 22, 1989 Note. BMC is indebted to Home Federal in the amount of $63,256.80, plus interest thereon ($17.14 per diem) from December 21, 1994, pursuant to the terms of the May 22, 1989 -Note. The May 22, 1989 Note provides for Home Federal's recovery of attorneys' fees

37. Claim 17. On February 10, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $133,000.00 (the 'February 10, 1989 Note'). BMC failed to pay the payments due under the terms of the February 10, 1989 Note. BMC was indebted to Home Federal in the amount of $142,352-07, plus interest thereon ($35.56 per diem) from December 21, 1994, pursuant to the terms of the February 10, 1989 Note. The February 10, 1989 Note provides for Home Federal's recovery of attorneys' fees.

38. Claim 18. On March 9, 1989, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $23,900.00 (the "March 9, 1989 Note"). BMC failed to pay the payments due under the terms of the March 9, 1989 Note. BMC was indebted to Home Federal in the amount of $26,472.89, plus interest thereon ($6.79 per diem) from December 21, 1994, pursuant to the terms of the March 9, 1989 Note. The March 9, 1989 Note provides for Home Federal's recovery of attorneys' fees.

39. Claim 19. On October 26, 1990, BMI executed and delivered to Home Federal. a promissory note in the original principal amount of $1,340,000.00 (the "October 26, 1990 Note'). BMI failed to pay the payments due under the terms of the October 26, 1990 Note. BMI is indebted to Home Federal in the amount of $1,399,784.78, plus interest thereon ($242.29 per diem) from December 21, 1994, pursuant to the terms of the October 26, 1990 Note. The October 26, 1990 Note provides for Home Federal's recovery of attorneys' fees.

40. Claim 20. On June 22, 1990, BMI executed and delivered to Home Federal a promissory note in the original

principal amount of $937,000.00 (the 'June 22, 1990 Note"). BMI failed to pay the payments due under the terms of the June 22, 1990 Note. BMI is indebted to Home Federal in the amount of $1,066,959.84, plus interest thereon ($192.93 per diem) from December 21, 1994, pursuant to the terms of the June 22, 1990 Note. The June 22, 1990 Note provides for Home Federal's recovery of attorneys' fees.

41. Claim 21. On March 7, 1991, BW executed and delivered to Home Federal a promissory note in the original principal amount of $428,000.00 (the "March 7, 1991 Note"). BMI failed to pay the payments due under the terms of the March 7, 1991 Note. BMI is indebted to Home Federal in the amount of $47,045.56, plus interest thereon ($1.67 per diem) from December 21, 1994, pursuant to the terms of the March 7, 1991 Note. The March 7, 1991 Note provides for Home Federal's recovery of attorneys' fees.

42. Claim 22. On July 15, 1988, BMC and BMI executed and delivered to Home Federal a promissory note in the original principal amount of $2,100,000.00 (the "July 15, 1988 Note"). BMC and BMI failed to pay the payments due under the terms of the July 15, 1988 Note. BMC and BMI are indebted to Home Federal in the amount of $1,480,585.62, plus interest thereon ($261.08 per diem) from December 21, 1994, pursuant to the terms of the July 15, 1988 Note. The July 15, 1988 Note provides for -Home Federal's recovery of attorneys' fees.

43. Claim 23. On July 7, 1989, BMI executed and delivered to Home Federal a promissory note in the original principal amount of $390,000.00 (the 'July 7, 1989 Note'). BMI failed to pay the payments due under the terms of the July 7, 1989 Note. BMI is indebted to Home Federal in the amount of $401,616.55, plus interest thereon ($74.46 per diem) from December 21, 1994, pursuant to the terms of the July 7, 1989 Note. The July 7, 1989 Note provides for Home Federal's recovery of attorneys' fees.

44. Claim 24. On August 14, 1985, BMC executed and delivered to Home Federal a promissory note in the original

principal amount of $428,000.00 (the "August 14, 1985 Note"). BMC failed to pay the payments due under the terms of the August 14,1985 Note. BMC is indebted to Home Federal in the amount of $183,515.57, plus interest thereon ($34.23 per diem) from December 21, 1994, pursuant to the terms of the August 14, 1985 Note. The August 14, 1985 Note provides for Home Federal's recovery of attorneys' fees.

45. Claim 25. On June 15, 1990, BMI executed and delivered to Home Federal a promissory note in the original principal amount of $125,000.00 (the 'June 15, 1990 Note').. BMI failed to pay the payments due under the terms of the June 15, 1990 Note. BMI is indebted to Home Federal in the amount of $176,115.93, plus interest thereon ($33.36 per diem) from December 21, 1994, pursuant to the terms of the June 15, 1990 Note. The June 15, 1990 Note provides for Home Federal's recovery of attorneys' fees.

46. Claim 26. On August 26, 1987, BMC executed and delivered to Home Federal a promissory note in the original principal amount of $850,000.00 (the 'August 26, 1987 Note"). BMC failed to pay the payments due under the terms of the August 26, 1987 Note. BMC is indebted to Home Federal in the amount of $293,852.87, plus interest thereon ($52.35 per diem) from December 21, 1994, pursuant to the terms of the August 26, 1987 Note. The August 26, 1987 Note provides for Home Federal's recovery of attorneys' fees.

47. Claim 27. On March 12, 19871 BMC executed and delivered to Home Federal a promissory note in the original principal amount of $235,000.00 (the 'March 12, 1987 Note"). BMC failed to pay the payments due under the terms of the March 12, 1987 Note. BMC is indebted to Home Federal in the amount of $33,263.79 plus interest thereon ($7.03 per diem) from December 21, 1994, pursuant to the terms of the March 12, 1987 Note. The March 12, 1987 Note provides for Home Federal's recovery of attorneys' fees.

48. Claim 28. On July 15, 1988, BMC and BMI executed and delivered to Home Federal a promissory note in the original

principal amount of $ 1, 1 00, 000. 00 (the "July 15, 1988 Note'). BMC and BMI failed to pay the payments due under the terms of the July 15, 1988 Note. BMC and BMI are indebted to Home Federal in the amount of $970,421.07 plus interest thereon ($167.47 per diem) from December 21, 1994, pursuant to the terms of the July 15, 1988 Note. The July 15, 1988 Note provides for Home .-Federal's recovery of attorneys' fees.

49. Claim 29. On May 31, 1985, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $225,000.00 (the 'May 31, 1985 Note"). MACO failed to pay the payments due under the terms of the May 31, 1985 Note. MACO was indebted to Home Federal in the amount of $256,566.28 plus interest thereon ($62.76 per diem) from December 21, 1994, pursuant to the terms of the May 31, 1985 Note. The May 31, 1985 Note provides for Home Federal's recovery of attorneys' fees.

50. Claim 30. On July 30, 1992, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $96,600.00 (the 'July 30, 1992 Note"). MACO failed to pay the payments due under the terms of the July 30, 1992 Note. MACO was indebted to Home Federal in the amount of $102,749.67 plus interest thereon ($25.63 per diem) from December 21, 1994, pursuant to the terms of the July 30, 1992 Note. The July 30, 1992 Note provides for Home Federal's recovery of attorneys' fees.

51. Claim 31. On July 30, 1992, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $94,350.00 (the "July 30, 1992 Note"). MACO failed to pay the payments due under the terms of the July 30, 1992 Note. MACO was indebted to Home Federal in the amount of $100,383.55 plus interest thereon ($25.04 per diem) from December 21, 1994, pursuant to the terms of the July 30, 1992 Note. The July 30, 1992 Note provides for Home Federal's recovery of attorneys' fees.

52. Claim 32. On July 30, 1992, MACO executed and delivered to Home Federal a promissory note in the original

principal amount of $99,600.00 (the "July 30, 1992 Note"). MACO failed to pay the payments due under the terms of the July 30, 1992 Note. MACO was indebted to Home Federal in the amount of $108,118.51 plus interest thereon ($26.57 per diem) from December 21, 1994, pursuant to the terms of the July 30, 1992 Note. The July 30, 1992 Note provides for Home Federal's recovery of attorneys' fees.

53. Claim 33. On July 30, 1992, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $104, 100.00 (the "July 30, 1992 Note'). MACO failed to pay the payments due under the terms of the July 30, 1992 Note. MACO was indebted to Home Federal in the amount of $110,577.59 plus interest thereon ($27.62 per diem) from December 21, 1994, pursuant to the terms of the July 30, 1992 Note. The July 30, 1992 Note provides for Home Federal's recovery of attorneys' fees.

54. Claim 34. On October 30, 1990, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $47,250.00 (the 'October 30, 1990 Note'). MACO failed to pay the payments due under the terms of the October 30, 1990 Note. MACO was indebted to Home Federal in the amount of $48,389-25 plus -interest thereon ($13.63 per diem) from December 21, 1994, pursuant to the terms of the October 30, 1990 Note. Ile October 30, 1990 Note provides for Home Federal's recovery of attorneys' fees

55. Claim 35. On October 30, 1990, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $48,000.00 (the 'October 30, 1990 Note'). MACO failed to pay the payments due under the terms of the October 30, 1990 Note. MACO was indebted to Home Federal in the amount of $49,133.98 plus interest thereon ($13.84 per diem) from December 21, 1994, pursuant to the terms of the October 30, 1990 Note. The October 30, 1990 Note provides for Home Federal's recovery of attorneys' fees.

56. Claim 36. On October 30, 1990, MACO executed and delivered to Home Federal a promissory note in the original

Drincipal amount of $28,500.00 (the 'October 30, 1990 Note"). MACO failed to pay the payments due under the terms of the October 30, 1990 Note. MACO was indebted to Home Federal in the amount of $29,507.02 plus interest thereon ($8.25 per diem) from December 21, 1994, pursuant to the terms of the October 30, 1990 Note. The October 30, 1990 Note provides for Home Federal's recovery of attorneys' fees.

57. Claim 37. On October 30, 1990, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $51,000.00 (the 'October 30, 1990 Note'). MACO failed to pay the payments due under the terms of the October 30, 1990 Note. MACO was indebted to Home Federal in the amount of $52,450.02, plus interest thereon ($14.80 per diem) from December 21, 1994, pursuant to the terms of the October 30, 1990 Note. The October 30, 1990 Note provides for Home Federal's recovery of attorneys' fees.

58. Claim 38. On January 12, 1990, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $75,000.00 (the 'January 12, 1990 Note"). MACO failed to pay the payments due under the terms of the January 12, 1990 Note. MACO was indebted to Home Federal in the amount of $73,745.98, plus interest thereon ($19.88 per diem) from December 21, 1994, pursuant to the terms of the January 12, 1990 Note. The January 12, 1990 Note provides for Home Federal's recovery of attorneys' fees.

59. Claim 39. On January 12, 1990, MACO executed and delivered to Home Federal a promissory note in the original principal amount of $75,000.00 (the 'January 12, 1990 Note"). MACO failed to pay the payments due under the terms of the January 12, 1990 Note. MACO was indebted to Home Federal in the amount of $73,692.8 1, plus interest thereon ($19.88 per diem) from December 21, 1994, pursuant to the terms of the January 12, 1990 Note. The January 12, 1990 Note provides for Home Federal's recovery of attorneys' fees.

60. Claim 40. On May 15, 1989, MACO executed and delivered to Home Federal a promissory note in the original

principal amount of $92,000.00 (the 'May 15, ---1989 Note'). MACO failed to pay the payments due under the terms of the May 15, 1989 Note. MACO was indebted to Home Federal in the amount of $86,026.33 plus interest thereon ($2.5.40 per diem) from December 21, 1994, pursuant to the terms of the May 15, 1989 Note. The May 15, 1989 Note provides for Home Federal's recovery of attorneys' fees.

61. Claim 41. On August 16, 1990, Apple Homes executed and delivered to Home Federal a promissory note in the original principal amount of $131,250.00 (the 'August 16, 1990 Note'). Apple Homes failed to pay the payments due under the terms of the August 16, 1990 Note. Apple Homes was indebted to Home Federal in the amount of $148,577.56 plus interest thereon ($4O.l8 per diem) from December 21, 94, pursuant to the terms of the August 16, 1990 Note. The August 16, 1990 Note provides for Home Federal's recovery of attorneys' fees.

62. Claim 42. On October 2, 1990, Apple Homes executed and delivered to Home Federal a promissory note in the original principal amount of $108,000.00 (the 'October 2, 1990 Note'). Apple Homes failed to pay the payments due under the terms of the October 2. 1990 Note. Apple Homes was indebted to Home Federal in the amount of $121-,878.10 plus interest thereon ($33.07 per diem) from December 21, 1994, pursuant to the terms of the October 2, 1990 Note. The October 2, 1990 Note provides for Home Federal's recovery of attorneys' fees.

63. Claim 43. On October 2, 1990, Apple Homes executed and delivered to Home Federal a promissory note in the original principal amount of $116,600.00 (the "October 2, 1990 Note'). Apple Homes failed to pay the payments due under the terms of the October 2, 1990 Note. Apple Homes was indebted to Home Federal in the amount of $131,719.51 plus interest thereon ($35.70 per diem) from December 21, 1994, pursuant to the terms of the October 2, 1990 Note. The October 2, 1990 Note provides for Home Federal's recovery of attorneys' fees.

64. Claim 44. On August 1,, 1990, Apple Homes executed and delivered to Home Federal a promissory note in the original

principal amount of $131,250.00 (the "August 16, 1990 Note"). Apple Homes failed to pay the payments due under the terms of the August 16, 1990 Note. Apple Homes was indebted to Home Federal in the amount of $148,505.73 plus interest thereon ($40.12 per diem) from December 21, 1994, pursuant to the terms of the August 16, 1990 Note. The August 16, 1990 Note provides for Home Federal's recovery of attorneys' fees.

65. Claim 45. On December 27, 1989, Apple Homes executed and delivered to Home Federal a promissory note in the original principal amount of $104,900.00 (the "December 27, 1989 Note'). Apple Homes failure to pay the payments due under the terms of the December 27,, 1989 Note. Apple Homes was indebted to Home Federal in the amount of $120,658.09 plus interest thereon ($33.60 per diem) from December 21, 1994, pursuant to the terms of the December 27, 1989 Note. The December 27, 1989 Note provides for Home Federal's recovery of attorneys' fees.

66. Claim 46. On December 27, 1989, Apple Homes executed and delivered to Home Federal a promissory note in the original principal amount of $104,900-00 (the 'December 27, 1989 Note'). Apple Homes failed to pay the payments due under the terms of the December 27, 1989 Note. Apple Homes was indebted to Home Federal in the amount of $118,202.66 plus interest thereon ($33.60 per diem) from December 21, 1994, pursuant to the terms of the December 27, 1989 Note. The December 27, 1989 Note provides for Home Federal's recovery of attorneys' fees.

67. The Court takes judicial notice of the fact, and so finds, that those promissory note obligations of the McLemore Group to Home Federal identified as claim numbers 29 through 46 and referred to in Findings of Fact numbers 49 through 66 (the MACO Loans') are secured by liens on real property owned by MACO, that MACO is a Chapter 1 1 debtor in Case No. 94-30421 currently pending in this Court; that MACO had its Plan of Reorganization confirmed in this Court on February 17, 1995; that pursuant to MACO's Plan of Reorganization, the

MACO Loans were modified, deaccelerated, and extended in such a manner as to provide for complete payment of said loans by MACO Homes, Inc.; and that the MACO Plan of Reorganization provided that it did not affect liability of guarantors of the MACO Loans.

68. The Court furtherer takes judicial notice of, and so finds, that the promissory note obligations of the McLemore Group to Home Federal identified as claim numbers 1 1 and 13 and referred to in Findings of Fact 31 and 33 were secured by deeds of trust on real property owned by MACO; that the confirmed Plan of Reorganization of MACO provided that Home Federal would have relief from the automatic stay, with respect to these loans on or about February 28, 1995, and would be free to foreclose its deeds of trust securing these loans. The Court further takes judicial notice of, and so finds, that the loan referred to in Finding of Fact 31 is presently in foreclosure in Special Proceeding 95-SP-0062 in the office of the Clerk of Superior Court of Union County, North Carolina, and that as to this loan, upon completing foreclosure proceedings, the net amount of the foreclosure proceeds that are paid to Home Federal directly, or by credit bid, should be credited against the indebtedness due under the promissory note. The Court further takes judicial notice of, and so finds, that the loan referred to in Finding of Fact 33 has been paid in full.

69. The Court takes judicial notice of the fact, and so finds, that the promissory note obligations of the McLemore Group to Home Federal identified as claim numbers 17 and 18 and referred to in Findings of Fact 37 and 38 were secured by deeds of trust on real 'property owned by Apple Realty; that Apple Realty is a Chapter 11 debtor in Case No 94-30341 currently pending in this Court; that Home Federal was granted relief from the automatic stay and was authorized to foreclose its deeds of trust securing the repayment of said notes. With respect to the loan referred to in Finding of Fact 37, the Court takes judicial notice of the fact, and so finds, that this loan was foreclosed in Special Proceeding File No. 94-SP-2040 in the

office of the Clerk of Superior Court of Mecklenburg County, North Carolina; that a Final Account was filed in said foreclosure proceeding on February 9, 1995, showing a credit of $99,055.97 from the proceeds of --the foreclosure sale to be applied to the indebtedness. With respect to the loan referred to in Finding of Fact 38, the Court takes judicial notice of, and so finds, that real property which was the collateral for said loan was conveyed from Apple Realty 2000, Inc. to Home Federal by deed recorded on March 8, 1995, in Book 8078 at Page 623 in the Mecklenburg County Public Registry and that said deed provided that the consideration for the conveyance was the satisfaction of the obligation of the promissory note.

70. With respect to the loan referred to in Finding of Fact 21, the court takes judicial notice of the fact, and so finds, that @ loan was foreclosed in Special Proceeding File No. 94-SP-888 in the office of the Clerk of Superior Court of Mecklenburg County, North Carolina; that a Final Account was filed in said foreclosure proceeding on February 2, 1995, showing a credit of $193,506.91 from the proceeds of the foreclosure sale to be applied to the indebtedness.

71. On November 9, 1990, McLemore and BMC executed a Guaranty of Payment and Performance (the 'Guaranty'). Pursuant to the terms of this document, McLemore, individually, and BMC became guarantors of all Home Federal loans, past and present, to BMC, BMH, Apple Realty, MACO, BMI, Apple Homes, and Bob McLemore Heritage Homes, Inc.

72. The terms of the Guaranty provide for the recovery of attorneys' fees.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court makes the following conclusions of law.

1. Home Federal is entitled to Summary Judgment dismissing the plaintiffs' claims against Home Federal in this proceeding with prejudice, because the undisputed material facts show that the McLemore Group executed a valid and enforceable written agreement releasing Home Federal from all the claims asserted in this proceeding. As a matter of law, the Release is a complete bar to the plaintiffs' claims.

2. Plaintiffs' allegations of duress fail as plaintiff's have failed to demonstrate sufficient evidence to establish a genuine issue of material fact as to the existence of duress. Further, the plaintiffs' allegations of duress as a means to avoid the release contained in the Agreement (the 'Release') fail as a matter of law as the plaintiffs at all times had available to them alternatives to executing the Release.

3. The plaintiffs' allegations of fraud as a means of avoiding the Release fail as a matter of law as it is undisputed that the plaintiffs were aware of the presence of, the contents of, and the meaning of the Release in the August 20, 1993 Agreement and were in no way mislead as to its existence or meaning. Maynardv. Durham, 251 N.C. 783, 112 S.E. 2d 249, rev'd on other arounda (1960); Ward v. Heath, 222 N.C. 470, 24 S.E. 2d 5 (1943); Harrison v. Southern Ryl. Co., 229 N.C. 92, 47 S.E. 2d 698 (1948).

4. Home Federal is entitled to summary judgment on the breach of the alleged oral contract to lend claims because the facts show that there were no written commitments to lend signed by Home Federal to support these allegations.- Section 22-5 of the North Carolina General Statutes requires that such commitments be in writing and signed by the party to be bound in order to be enforceable.

5. Home Federal is entitled to summary judgment on all breach of alleged commitments to lend claims (including those "commitments to lend" which allegedly existed before 1988 or

are allegedly evidenced by writing) because the essential terms of the alleged contracts were not agreed to by the parties (no agreement as to interest rate, repayment schedule, the date the funds were to be available, and/or the amount of the loans). Accordingly, there was no agreement and, therefore, no breach. DeMaine v. Bank One, Akron, 904 F.2d 214 (4th Cir. 1990); Gray v. Har, 69 N.C. App. 331, 317 S.E. 2d 59 (1984).

6. Home Federal is entitled to summary judgment on all N.C. G. S. Chapter 75 claims which accrued prior to February 22, -1990, as those claims are barred by the applicable Statute of Limitations (N.C.G.S. §57-16.2).

7 . Home Federal is entitled to summary judgment on all claims of fraud which accrued prior to February 22, 1991, as those claims are barred by the applicable Statute of Limitations (N.C.G.S. §1-52(9)).

8. Home Federal is entitled to summary judgment on all claims for tortious interference with contracts which accrued prior to February 22, 1991, as those claims are barred by the applicable Statute of Limitations (N.C.G.S. §1-52(5)).

9. Home Federal is entitled to summary judgment on all claims for breach of contract, not under seal, which accrued prior to February 22, 1991, as those claims are barred by the applicable Statute of Limitations (N.C.G.S. §1-52(l)).

The following Conclusions of Law numbered 10 through 41 relate to Findings of Fact numbered 21 through 66 and the claim numbers identified therein.

10. Claim 1. After applying the February 2, 1995 foreclosure proceedings credit of $193,506.91 to the indebtedness due Home Federal under the December 14, 1988 Note ($249,370.94 plus interest thereon from December 21, 1994, plus attomey's fees) Home Federal is entitled to recover the sum of $55,864.03, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (I 5 %) of the outstanding balance, from BMH and BMC and McLemore, individually, pursuant to the terms of the December 14, 1988 Note, the related Guaranty Agreement and North

Carolina General Statutes §6-21.2.

11. Claim 2. Home Federal is entitled to recover the sum of $95,771.19, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen -percent (15%) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the June 29, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

12. Claim 3. Home Federal is entitled to recover the sum of $107,300.37, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMC and McLemore, individually, ,pursuant to the terms of the May 26, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

13. Claim 4. Home Federal is entitled to recover the sum of $55,396.88, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the January 27, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

14. Claim 5. Home Federal is entitled to recover the sum of $83,388.46, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteenpercent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the January 17, 1991 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

15. Claim 6. Home Federal is entitled to recover the sum of $102,263.61, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the May 10, 1990 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

16. Claim 7. Home Federal is entitled to recover the sum of $78,676.24, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the November 28, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

17. Claim 8. Home Federal is entitled to recover the sum of $104,935. 10, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the May 31, 1990 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

18. Claim 9. Home Federal is entitled to recover the sum of $88,028.68, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the June 15, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

19. Claim 10. Home Federal is entitled to recover the sum of $117,782.42, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the September 29, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

20. Claim 11. Home Federal is entitled to recover the sum of $168,066.62, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the April 11, 1990 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2. Upon completion of the foreclosure proceeding, the net amount of the foreclosure proceeds that are

paid to Home Federal directly, or by credit bid, should be credited against the indebtedness due under the April 11, 1990 Note.

21. Claim 12. Home Federal is entitled to recover the sum of $70,737.69, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the May 22, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

22. Claim 13. BMC is no longer indebted to Home Federal on the November 29, 1989 Note.

23. Claim 14. BMC is no longer indebted to Home Federal on the March 30, 1989 Note.

24. Claim 15. BMC is no longer indebted to Home Federal on the April 1 1, 1990 Note.

25. Claim 16. Home Federal is entitled to recover the sum of $63,256.80, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the May 22, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

26. Claim 17. After applying the February 9, 1995 foreclosure proceedings credit of $99,055.97 to the indebtedness due Home Federal under the February 10, 1989 Note ($142,352.07 plus interest thereon from December 21, 1994, plus reasonable attorneys' fees); Home Federal is entitled to recover $43,296. 10 plus interest thereon from December 21, 1994, plus attorneys' fees in the amount of fifteen percent (15 %) of the outstanding balance from BMC and McLemore, individually, pursuant to the terms of the February 10, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

27. Claim 18. BMC is no longer indebted to Home Federal on the March 9, -1989 Note.

28. Claim 19. Home Federal is entitled to recover the sum of $1,399,784-78, plus interest thereon from December 21, 1994, plus attorneys' fees, in.the amount of fifteen percent (15 %) of the outstanding balance, from BMI and BMC and McLemore, individually, pursuant to the terms of the October 26, 1990 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

29. Claim 20. Home Federal is entitled to recover the sum of $1,066,959.84, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMI and BMC and McLemore, individually, pursuant to the terms of the June 22, 1990 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

30. Claim 21. Home Federal is entitled to recover the sum of $47,045.56, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMI and BMC and McLemore, individually, pursuant to the terms of the March 7, 1991 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

31. Claim 22. Home Federal is entitled to recover the sum of $1,480,585.62, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMC, BMI and McLemore, individually, pursuant to the terms of the July 15, 1988 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

32. Claim 23. Home Federal is entitled to recover the sum of $401,616.55, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMI and BMC and McLemore, individually, pursuant to the terms of the July 7, 1989 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

33. Claim 24. Home Federal is entitled to recover the sum

of $183,515.57, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the August 14, 1985 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

34. Claim 25. Home Federal is entitled to recover the sum of $176,115.93, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMI and BMC and McLemore, individually, pursuant to the terms of the June 15, 1990 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

35. Claim 26. Home Federal is entitled to recover the sum of $293,852.87, plus -interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen percent (15%) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the August 26, 1987 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

36. Claim 27. Home Federal is entitled to recover the sum of $33,263.79, plus interest thereon from December 21, 1994, plus attorneys' fees, in the amount of fifteen ,percent (15 %) of the outstanding balance, from BMC and McLemore, individually, pursuant to the terms of the March 12, 1987 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

37. Claim 28. Home Federal is entitled to recover the sum of $970,421.07, plus interest thereon from December 21,, 1994, plus attorneys' fees, in the amount of fifteen percent (15 %) of the outstanding balance, from BMC, BMI and McLemore, individually, pursuant to the terms of the July 15, 1988 Note, the related Guaranty Agreement and North Carolina General Statutes §6-21.2.

38. Claims 29 through 46, which are described in Findings of Fact 49-66, all relate to loans which were modified, de-

accelerated and extended in such a manner as to provide for payment of said loans by MACO in accordance with its confirmed Plan of Reorganization; therefore, all of these loans are now governed by the provisions of MACO s Plan of Reorganization and are modified pursuant thereto, and in accordance with the Plan of Reorganization the guarantors of said loans, BMC and McLemore, remain obligated pursuant to the November 9, 1990 Guaranty of Payment and Performance.

39. Home Federal is entitled to have the claims against it in this proceeding dismissed, with prejudice.

40. Home Federal is entitled to recover its costs from the plaintiffs.

41. Pursuant to Rule 7054 of the Federal Rules of Bankruptcy Procedure and Rule 54 of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay of entry of an order granting Home Federal Savings & Loan Association of Charlotte's Motion for Summary Judgment and recommends that the District Court expressly direct the entry of judgment as provided for in these findings of fact and conclusions of law.

It is, therefore, ORDERED, ADJUDGED AND DECREED as follows:

That the above findings and conclusions are hereby made and determined of record and that a separa shall forthwith issue accordingly.

Dated this 26th day *of* September *1995.*

S/ Graham C Mullen
UNITED STATES DISRICT COURT JUDGE

ORDER AND JUDGMENT

UNITED STATES DISTRICT COURT IN THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. 3:45 Mc 4 MU

IN RE:-
MACO HOMES, INCORPORATED,
Debtor.
I.D.NO 561064881

CASE NO. 94-30421
Chapter11

BOB McLEMORE AND CO., INC., et al.,
Plaintiffs,
vs.
BRANCH BANKING & TRUST Co.,
Defendant,

and HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF CHARLOTTE,
Defendant and Third-Party Plaintiff,
vs.
ROBERT V McLEMORE ,
Third Part Defendant.

ADVERSARY PROCEEDING NO. 94-3108

ORDER AND JUDGMENT

THIS MATTER came before the Court upon the Motion for Summary Judgment filed by Home Federal Savings & Loan Association of Charlotte.

This Court has considered the record, and in accordance with our findings of fact and conclusions of law heretofore entered, this Court now enters the following ORDER AND JUDGMENT:

It is, therefore, ORDERED, ADJUDGED AND DECREED as follows:

1. That Home Federal Savings & Loan Association of Charlotte's ("Home Federal") Motion for Summary Judgment is hereby granted.

2. That the claims in the proceeding against Home Federal are hereby dismissed , with prejudice.

3. **Claim 1.** That Home Federal have and recover of BMH, BMC and McLemore, jointly and severally, the sum of $55,864.03 plus interest thereon from December 21, 1994 at the rate specified in the December 14, 1988 Note, until paid.

4. That Home Federal have and recover of BMH, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $8,379.60 in accordance with the terms of the December 14, 1988 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

5. **CLAIM 2.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $95,771.19 plus interest thereon from December 21, 1994 at the rate specified in the June 29, 1989 Note, until paid.

6. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $14,365.68 in accordance with the terms of the June 29, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

7. **Claim 3.** That Home Federal have and recover of BMC

and McLemore, jointly and severally, the sum of $107,300.37 plus interest thereon from December 21, 1994 at the rate specified in the May 26, 1989 Note, until paid.

8. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $16,095.05 in accordance with the terms of the May 26, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

9. **Claim 4.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $55,396.88 plus interest thereon from December 21, 1994 at the rate specified in the January 27, 1989 Note, until paid.

10. That Home Federal have and recover of BMC, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $8,309.53 in accordance with the terms of the January 27, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

11. **Claim 5.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $83,388.46 plus interest thereon from December 21, 1994 at the rate specified in the January 17, 1991 Note, until paid.

12. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $12,508.27 in accordance with the terms of ' the January 17, 1991 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

13. **Claim 6.** That Home Federal have and recover of BMC and McLemore , jointly and severally, the sum of $102,263.61 plus interest thereon from December 21, 1994 at therate specified in the May 10, 1990 Note, until paid.

14. That Home Federal have and recover of BMC, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $15,339.54 in accordance with the terms of the May 10, 1990 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

15. **Claim 7.** That Home Federal have and recover of BMC

and McL emore, jointly and severally, the sum of $78,676.24 plus interest thereon from December 21, 1994 at the rate specified in the November 28, 1989 Note, until paid.

16. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $11,801.44 in accordance with the terms of the November 28, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

17. **Claim 8** That Home Federal have and recover ofBMC and McLemore, jointly and severally, the sum of $104,935. 10 plus interest thereon from December 21, 1994 at thereat specified in the May 31,1990 Note, until paid.

18. That Home Federal have and recover of BMC and McLemore, jointly severally, its attorneys' fees in the amount of $15,740.26 in accordance with the terms of the May 31, 1990 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

19. **Claim 9.** That Home Federal have and recover of BMC and McLemore , jointly and severally, the sum of $88,028.68 plus interest thereon from December 21, 1994 at the rate specified in the June 15, 1989 Note, until paid.

20. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $13,204.30 in accordance with the terms of the June 15, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

21. **Claim 10.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $117,782.42 plus interest thereon from December 21, 1994 at the rate specified in the September 29, 1989 Note, until paid.

22. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $17,667.36 in accordance with the terms of the September 29, 1989 Note, the related Guaranty agreement

and North Carolina General Statute §6-21.2.

23. **Claim 11.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $168,066.62 plus interest thereon from December 21, 1994 at the rate specified in the April 11, 1990 Note, until paid.

24. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $25,209.99 in accordance with the terms of the April 11, 1990 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

25. **Claim 12.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $70,737.69 plus interest thereon from December 21, 1994 at the rate specified in the May 22, 1989 Note, until paid.

26. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $10,610.65 in accordance with the terms of the May 22, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

27. **Claim 16**. That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $63,256.80 plus interest thereon from December 21, 1994 at the rate specified in the May 22, 1989 Note, until paid.

28. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $9,488.52 in accordance with the terms of the May 22, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

29. **Claim 17.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $43,296.10 plus interest thereon from December 21, 1994 at the rate specified in the February 10, 1989 Note, until paid.

30. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $6,494.42 in accordance with the terms of the February 10, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

31. **Claim 19.** That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, the sum of $1,399,784.78 plus interest thereon from December 21, 1994 at the rate specified in the October 26, 1990 Note, until paid.

32. That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $209,967.72 in accordance with the terms of the October 26, 1990 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

33. **Claim 20**. That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, the sum of $1,066,959.84 plus interest thereon from December 21, 1994 at the rate specified in the June 22, 1990 Note, until paid.

34. That Home Federal have and recover of BMC, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $160,043.98 in accordance with the terms of the June 22, 1990 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

35. **Claim 21.** That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, the sum of $47,045.56 plus interest thereon from December 21, 1994 at the rate specified in the March 7, 1991 Note, until paid.

36. That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $7,056.83 in accordance with the terms of

the March 7, 1991 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2. -

37. **Claim 22.** That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, the sum of $1,480,585.62 plus interest thereon from -December 21, 1994 at the rate specified in the July 15, 1988 Note, until paid.

38. That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $222,087.84 in accordance with the terms of the July 15, 1988 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

39. **Claim 23.** That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, the sum of $401,616.55 plus interest thereon from December 21, 1994 at the rate specified in the July 7, 1989 Note, until paid.

40. That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $60,242.48 in accordance with the terms of the July 7, 1989 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

41. **Claim 24.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $183,515.57 plus interest thereon from December 21, 1994 at the rate specified in the August 14, 1985 Note, until paid.

42. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $27,527.34 in accordance with the terms of the August 14, 1985 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

43. **Claim 25.** That Home Federal have and recover of

BMI, BMC and McLemore, jointly and severally, the sum of $176,115.93 plus interest thereon from December 21, 1994 at the rate specified in the June 15, 1990 Note, until paid.

44. That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $26,417.39 in accordance with the terms of the June 15, 1990 Note, the related Guaranty agreement and North Carolina General Statute §6-21-2.

45. **Claim 26.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $293,852.87 plus interest thereon from December 21, 1994 at the rate specified in the August 26, 1987 Note, until paid.

46. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $44,077.93 in accordance with the terms of the August 26, 1987 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

47. **-Claim 27.** That Home Federal have and recover of BMC and McLemore, jointly and severally, the sum of $33,263.79 plus interest thereon from December 21, -- 1994 at the rate specified in the March 12, 1987 Note, until paid.

48. That Home Federal have and recover of BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $4,989.50 in accord ance with the terms of the $ 12, 1987 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

49. **Claim 28.** That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, the sum of $970,421.07 plus interest thereon from December 21, 1994 at the rate specified in the July 15, 1988 Note, until

paid.

50. That Home Federal have and recover of BMI, BMC and McLemore, jointly and severally, its attorneys' fees in the amount of $145,563.16 in accordance with the terms of the July 15, 1988 Note, the related Guaranty agreement and North Carolina General Statute §6-21.2.

51. That the clerk shall tax all costs against the plaintiffs.

Dated this the 26th day of September 1995.

GRAHAM C MULLEN

UNITED STATES DISTRICT COURT JUDGE

Third Party Defendant - Appellant

No. 95-2939
CA-95-4-3-Ki
BK-94-30421

In Re: MACO HOMES, INCORPORATED

Debtor

BOB MCLEMORE AND COMPANY, INCORPORATED ; BOB MCLEMORE HOMES, INCORPORATED; APPLE HOMES, INCORPORATED; APPLE REALTY 2000, INCORPORATED;BMI LAND COMPANY, INCORPORATED; MACO HOMES,
I NCORPORATED

Plaintiffs - Appellants

v

BRANCH BANKING & TRUST COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE

Defendants - Appellees

V.

ROBERT V. MCLEMORE

Third Party Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court on the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

FEDERAL RULES OF CIVIL PROCEEDURE

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other

relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly .

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

RELEASE OF CLAIMS
RE: BRANCH BANKING & TRUST

October Agreement and the occurrence of any default under the October Agreement shall be a default under this Agreement.

2. Loan Agreement. Effective as of the date hereof, Section 7 of Part IV of the Loan Agreement is hereby deleted.

3. Release. Upon the recording of tha Deeds and cancellation of the indebtedness in respect of the Loans as agreed herein, each Borrower and Guarantor on its own behalf and on behalf of its predecessors, successors, heirs and assigns (including, without limitation, any receivers, examiners or trustees in bankruptcy), and on behalf of their former, present or future employees, representatives and agents remits, releases and forever discharges the Bank from any and all claims, losses, liabilities, demands, actions, or causes of actions of any kind whatsoever, if any, whether absolute or contingent, known or unknown, matured or umatured, that the Borrower or the Guarantors, individually, or as a group, may now have or ever had against the Bank, its present or former officers, directors, employees, attorneys, agents, parents, affiliates, subsidiaries, successors, predecessors, assigns and representatives in their individual and represented capacities, including but not limited to, any and all claim s against the Bank, arising from or in any

way related to the Loans which are being cancelled and described on Exhibit 2. Except as provided in paragraph 4 hereof, and upon the full and timely compliance by each Borrower and Guarantor with all the terms and conditions of the October Agreement and this Agreement and upon receipt of properly recorded Deeds and the Insurance Policies, the Bank will cancel the indebtedness under the Loans described an Exhibit 2.

LOAN WORKOUT AGREEMENT
RE: HOME FEDERAL

STATE OF NORTH CAROLINA AGREEMENT
COUNTY OF MECKLEMBURG

THIS AGREEMENT, made as of the 20th day of August, 1993, by and between HOME FEDERAL *SAVINGS* AND LOAN ASSOCIATION, a corporation organized and existing under the laws of the United States of America ('Home Federal'), BMI LAND *CO.,INC.* a North Carolina corporation ('BMI'), BOB McLEMORE AND *CO.*, INC., a North Carolina corporation ('BMC') and ROBERT V. McLEMORE, an individual ('McLemore").

RECITALS

BMI and BMC entered into various loan transactions with Home Federal which were guaranteed by McLemorc and BMC and which include but are not limited to those loans described on Exhibit A attached - hereto (the"'Loans"). This Agreement relates only to the loans described on Exhibit A McLemore, and BMC havc personally guaranteed all of the Loans pursuant to that certain Guaranty Agreement attached hereto as Exhibit B .(thc "Guaranty"). The Loans were originally made to BMCand/orBMI Land are secured by Deeds *of* Trust and/or Mortgages (the 'Deeds of *Trust* and 'Mortgages') covering, real property located in Mecklenburg County, North Carolina and York County, South Carolina (the "Collateral"). BMI is now the owner of all of the Collateral which remains encumbered by the Deeds of Trust and Mortgages, in some instances having acquired title to the Collateral from BMC pursuant to an Agreement whereby BMI assumed and agreed to pay the remaining indebtedness secured by said Deeds of *Trust or* Mortgages.

All of the Loans are materially in default and, under the terms thereof, Home Federal is entitled to initiate foreclosure proceedings under all of the Deeds of Trust and Mortgages. In *order* to give BMI time to sell as much of the Collateral as possible under favorable market conditions, BMI, BMC and McLemore have requested that Home Federal refrain from exercising its remedies under the Mortgages, Deeds of Trust and *Promissory* Notes which they secure (the "Notes"'). and the Guaranty, for a period *of 180* days and have further requested Home Federal to forgive a portion of the interest due on the Loans.

Home Federal is agreeable to such an arrangement provided that all of the parties hereto enter into this Agreement setting forth their agreements relating to the Loans.

THEREFORE, it is agreed as follows:

Forbearance Period.. Subject to the terms and conditions set forth herein, Home Federal shall take no action to collect the amounts due on any of the loans through enforcement of its rights to foreclose any of the Deeds of Trust or Mortgages, or initiate any action on the Guaranty , prior to February 15, 1994.

2. Representations and Warranties of BMI, BMC and McLemore. To induce Home Federal to enter into this Agreement, BMI, BMC and McLemore, jointly and severally, represent, warrant, covenant and agree as follows:

(a) That the foregoing Recitals are truthful and accurate in all respects.

(b) That the Guaranty and all of the Loan Documents related to each of the Loans as said Loans are more fully described on Exhibit A constitute legal and binding obligations of BMI, BMC and McLemore, as applicable, in every respect, and, subject to the terms, provisions and conditions of this

Agreement, are enforceable in every respect against BMI, BMC and McLemore, as applicable, all in accordance with their terms and remain in full force and effect.

(c) That as of July 30,1993 the outstanding indebtedness on each of the loans as set forth below and from and after July 30, 1993, interest shall accrue on each of the Notes in accordance with the terms of each Note, as it may have heretofore been modified, at the interest rates set forth therein, except as modified by this agreement.

Loan Number	Principal	Interest	Total
6673298	$ 204,522.00	$ 54,065.00	$258,857.00
6692314	667,847.00	210,771.00	878,618.00
6731864	124,999.00	31,965.00	156,964
6712583	295,783.00	64,068.00	359,851.00
6664800	27,891.00	1,296.00	29,187.00
6638754	128,000.00	35,665.00	163,665.00
6732193	766,567.00	192,371.00	958,938.00
6692322	1,070,989.00	295,349.00	1,366,338.00
6739131	1,148,750.00	296,892.00	1,445,642.00
Totals	$4,435,348.00	$1,82,442.00	$5,617,790.00

(d) That an event of defult has occurred and is continuing under each of the Notes; that all notices required to be sent to BMI, BMC and McLemore or to those obligated under each of the Notes or the Guaranty have been properly and timely provided by Home Federal; that the entire indebtedness evidenced by each of the Notes and other Loan Documents guaranteed by the Guaranty and secured by the deeds of Trust and Mortgages are now due and payable in full and shall remain due and payable in full, it being understood and agreed by BMI, BMC and McLemore that, except as expressly provided in this Agreement. Neither this Agreement nor any payments made pursuantto this Agreement shall constitute or be deemed or

construed to be a satisfaction, novation, cure, reinstatement, modification, amendment, waiver or release of the Notes, the Deed of Trust, the Mortgages, or any of the other Loan Documents related to each of the Loans, or any of the reights or remedies of Home Federal under the Loan Documents or the Guaranty.

(e) That Home Federal has not defaulted under any of its obligations to BMI, BMC or McLemorc with respect to any of the Loans, that Home Federal has not exercised any undue control over BMI, BMC or McLemore with respect to any of the Loans, and that BMI, BMC and.McLemore are entering into this Agreement at their own request; that there are no defenses, setoffs, offsets, equities, counterclaims or other claims, legal or equitable, available to BMI, BMC or McLemore or any other person or entity affiliated *with* any of them to or against the enforcement of any.of the Loan Documents related to any of the Loans, including without limitation, any such defenses, setoffs, offsets, equities, counterclaims or other claims, legal or equitable, which arise out of any of the Loan Documents, the obligation of BMI, BMC or McLemore to repay the Loans, as the case may be, or the course of dealings between Home Federal, and BMI, BMC and McLemore, and any representatives or affiliates thereof, and any such defenses, setoffs, offsets, equities, counterclaims or other claims, legal or equitable, available to BMI, BMC or McLemore, or any of them, or any entity affiliated with any of them, are hereby and forever released and discharged, and BMI, BMC and McLemore jointly and severally agree to indemnify and hold harmless Home Federal, its officers, employees and agents, from and against any claim, action., suit, demand, cost, expense or liability of any kind relating to the making of any of the Loans, the administration of any of the Loans, and any business communications and dealings with BMI, BMC or McLemore, and each of them, concerning any of the Loans, it being understood and agreed that such release and discharge are a material inducement to Home Federal to secure Home

Federal's consent to this Agreement.

(f) That BMI and BMC are duly organized and validly existing corporations under the laws of the State of North Carolina the officers of BMI and BMC are duly authorized to execute on behalf of BMI and BMC this Agreement and other instruments,documents and agreements to be delivered by them hereunder in connection with those matters contemplated hereby.

(g) That the descriptions of the Collateral remaining subject to the Deeds of Trust and Mortgages, is described on Exhibit A, is accurate, and that all of said remaining Collateral is owned by BMI, free and clear of all liens and encumbrances, except for unpaid property tax and the Deeds of Trust and Mortgages in favor of Home Federal; and that BMI will not further encumber in anyway any of the Collateral.

(h) That BMI and/or BMC, as the case may be, have complied fully with all state and local statutes, rules., ordinances and regulations relating to the development of the respective subdivisions wherein the Collateral lies and that the development of said subdivisions, including the construction of roads and utilities serving them have been completed and have been done in accordance with the foregoing representations and that all subdivision and road approvals have been obtained; and that all utilities serving said subdivisions have been installed in accordance with applicable requirements and regulations.

(i)That BMI and/or BMC, as the case may be, have fully paid all contractors and subcontractors who have provided labor or materials to any of the Collateral and that there are no outstanding obligations and that there are no outstanding obligations to any of said contractors or subcontractors with respect to improvements completed on the Collateral.

(j) That the water system described on Exhibit A under Loan *No.* 664800 has been completed, is operational, and has been given all required state and local approvals.

3. Forgiveness of Past Due Interest. Past due accrued interest on all of the Loans totalled $1,182,442.00 as of July 30, 1993. Upon execution of this Agreement and expressly conditioned upon there being no default hereunder by BMI, BMC or McLemore, Home Federal agrees to accept the amount of $792,236.00 as total past due interest for all of the Loans (as of July 30, 1993), the reduction of $390,206.00 being applied to each of the Loans on a pro rata percentage basis based upon the July 29, 1993 unpaid accrued interest on each Loan. Should an event of default occur under. this Agreement, this forgiveness of past due interest shall be void, ab initio, notwithstanding that a.portion of the Collateral may have been released from the Deeds of Trust or Mortgages.

4. Reduction of Interest Rate. Upon execution of this Agreement, the interest rate on all of the Loans shall from and after July 31, 1993, be reduced to eight percent (8 %) per annum and shall remain at that rate until the occurrence of an event of default or the expiration of the Forbearance Period, whichever shall first occur, at which time the interest rate on each of the Loans shall increase to the interest rates set forth in each of the Notes, as they may have been previously modified.

5. Sale of Collateral by BMI. BMI will immediately use its best efforts to sell all of the Collateral and shall diligently continue throughout the Forbearance Period to make such efforts. Out of the proceeds of the sale of each developed lot, Home Federal shall be paid the release price set forth on Exhibit A, plus any applicable release fee, with the release price being applied to the applicable Loan. The water plant described on Exhibit A under Loan No. 6664800 shall be released upon payment in full of Loan *No. 6664800.*

6. Further Reduction of Amounts Owed. As an additional inducement for BMI to sell tht remaining Collateral as quickly as possible in accordance with the provisions of Paragraph 5 hereof, Home Federal agrees that if, prior to January 15, 1994, BMI is able to pay Home Federal in full on all of the Loans (after taking into account the forgiveness of interest described in Paragraph 3 hereof and the reduction of interest rate described in Paragraph 4 hereof. HomeFederal will accept less than the total amount due in accordance with the following schedule:

If paid in full on or prior September 15, 1993, Home Federal will accept *$500,000.00 less* than' the amount which would otherwise be due, in full satisfaction of the Loans.

If paid in full on or prior to October 15, 1993, Home Federal will accept $400,000 less than the amount which would otherwise be due, in full satisfaction of the Loans.

If paid in full on or prior to November 15, 1993, Home Federal will accept $300,000 less than the amount which would otherwise be due, in full satisfaction of the Loans.

If paid in full on or prior to December 15, 1993, Home Federal will accept $200,000 less than the amount which would otherwise be due, in full satisfaction of the Loans.

If paid in full on or prior to January 15, 1994, Home Federal will accept $100,000 less than the amount which would otherwise be due, in full satisfaction of the Loans.

7. Construction Loans on Pre-sold Houses. Home Federal agrees to make construction loans (in accordance with its standard policies, procedures and guidelines) to individuals who purchased a developed lot from BMI, which lot is included in the Collateral. The Construction loan will be made to the

Buyer in connection with the transaction which the buyer closes on the purchase of such a developed lot from BMI.

8. Expiration of Forbearance Period. The forbearance period shall expire immediately upon the occurrence of an event of default or at 5:00 p.m. on February 14, 1994, whichever shall first occur, at which time Home Federal shall be free to pursue all of its remedies provided for in the Guaranty and in the Loan Documents related to each of the Loans. Upon the expiration of the forbearance period, for whatever reason, BMI agrees to offer a deed in lieu of foreclosure to Home Federal for all of the remaining Collateral in satisfaction of all remaining obligations secured by the Deeds of Trust and/or Mortgages; however, Home Federal shall be under no obligation to accept such deed in lieu of foreclosure from BMI if:

(a) An Event of Default as defined in Paragraph 9 hereof has occurred;

or

(b) Within twenty (20) days after the expiration of the forbearance period BMI is not able to deliver marketable fee simple title (insurable as to marketability by Investors Title Insurance Company) to all of the remaining Collateral free and clear of all liens and encumbrances except for property taxes, not yet due and payable, and the HomeFederal Loans described on Exhibit A.

In the event that, for one or more of the foregoing reasons set forth above, Home Federal declines to accept such deed in lieu of foreclosure then Home Federal, in its sole discretion., may proceed against any of the parties or the Collateral, with any of the remedies provided for in the Guaranty, the Notes, the Deeds of Trust, the Mortgages, or other Loan Documents related to any of the Loans.

9. Events of Default. Any of the following shall constitute an event of default hereunder:

(a) Any of the representations or warranties of BMI, BMC or McLemore contained in this Agreement are untrue or become untrue.

(b) BMI, BMC or McLemore fail to fully perform, in good faith, all of their obligations hereunder.

(c), BMI, BMC or McLemore or any of them shall file any voluntary petition under the Bankruptcy Code or shall file any petition of dissolution or liquidation or shall in any manner seek any relief under any state, federal or other insolvency laws or other laws providing for relief of debtors; or BMI, BMC or McLemore, or any of them, shall have any involuntary petition under any Chapter of the Bankruptcy Code filed against it or him, *or* shall become the subject of any dissolution, liquidation or insolvency proceedings , or any other proceedings pursuant ought any state or federal or insolvency laws or other laws providing for relief of debtors.

10. Choiceof Law. This Agreement shall be construed in accordance with the laws of the State of North Carolina.

11. Time of Essence. Time is of the essence with respect to each and every provision of this Agreement.

12. Binding Effect. A.ll provisions shall be binding upon all parties hereto, their heirs, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused Agreement to be executed as of this day and year first above written.

BMI LAND CO., *INC.*,
(CORPORATE SEAL)

BOB MCLEMORE AND CO,INC.
(CORPORATE SEAL)

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION
[CORPORATE SEAL)

GUARANTY OF PAYMENT & PERFORMANCE RE: HOME FEDERAL SAVINGS & LOAN ASSN. OF CHARLOTTE

GUARANTY OF PAYMENT AND PERFORMANCE

Mecklenburg County
November 9, 1990

TO: HOME FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation organized and existing under the laws of the United States of America ("Lender")

WHEREAS, as an inducement to Lender to loan funds from time to time to BOB MCLEMORE & COMPANY, INC., BOB MCLEMORE HOMES, INC., REALTY 2000, INC. (formerly Bomac Realty, Inc.), MACO *HOMES, INC.*, BMI LAND COMPANY, INC., APPLE HOMES, INC. (formerly Patriot Homes, Inc.), and BOB MCLEMORE'S HERITAGE HOMES, INC. ("Borrower"), the undersigned agree to guarantee the payment of the Notes evidencing loans upon the terms and conditions herein set forth.

NOW, THEREFORE, in consideration of the benefits to inure to Borrower, which are of direct and immediate benefit to the undersigned, and for other good and valuable considerations, the receipt of which being hereby acknowledged, the undersigned, absolutely and unconditionally, does hereby guarantee the payments of principal, interest, penalties, premiums and late charges due under the Note and ioes hereby guarantee the performance of all covenants of the Borrower under the terms and provisions of the Note.

The undersigned agrees that this Guaranty may be enforced by Lender without the necessity at any time of its

resorting to or exhausting any other security or collateral and without the necessity at any time of having recourse to the Note or any of the property securing such loans, either by foreclosure proceedings or otherwise; and the undersigned hereby waives the benefits of all provisions of law satisfaction of judgment against them on account of the obligations and liabilities hereunder until judgment be obtained therefor against Borrower and execution thereon be returned unsatisfied, or until it is shown that Borrower has no property available for the satisfaction of the indebtedness hereby guaranteed, or until any other proceedings can be had. The undersigned further agrees that nothing herein contained shall at any time prevent Lender from suing on the Notes -or foreclosing Deeds of Trust, or from exercising any other rights available to it under the "tote or the Loan Documents or security therefor, and the exercise of any of said rights shall not constitute a legal or equitable discharge of the undersigned that the obligations hereunder shall be absolute and unconditional under any and all circumstances.

The undersigned promises and agrees to pay the fees and expenses .incurred by Lender in enforcing Notes or the Deeds of Trust or the other loan Documents of this Guaranty, including without limitation reasonable attorneys' fees (whether or not suit or action is instituted)

In case any provision cortained iri this Guaranty shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of the Guaranty but this Guaranty shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

The Guaranty shall be binding upon the heirs, representatives, successors and assigns of the undersigned, and shall inure to the benefit of- the Lender, its successors and assigns.

Without limiting the generality of the foregoing, in the event there is a foreclosure of the collateral held by Lender and the proceeds from the sale of such collateral is not sufficient to pay the loan evidenced by the Loan Documents by Lender to Borrower in full together with all interest and all expenses of foreclosure, including reasonable attorneys and trustees fees, the undersigned shall be liable for the full amount of the deficiency.

This Guaranty shall be construed in accordance with the laws of the State of North Carolina.

All notices required or permitted hereunder shall be in writing and shall be deemed served forty-eight (48) hours after being sent by prepaid registered or certified mail, return receipt requested, and addressed to the parties as follows:

To Guarantors:
Robert V. McLemore
P. 0. Box 25746
Charlotte, North Carolina 28229

Bob McLemore & Company, Inc.
P. 0. Box 25746
Charlotte, North Carolina 28229

To Lender:
Home-Federal Savings & Loan
139 South Tryon Street
Charlotte, North Carolina 28202

or such other addresses as may from time to time be designated by written notice given as herein required.

WITNESS the hand and seal of the undersigned, as of the date above set forth.

(SEAL)
Robert V. McLemore
BOB MCLEMORE & COMPANY, INC.

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IN THE United States Court of Appeals
FOR THE FOURTH CIRCUIT RECORD
NOS. 95-2938 (L) and 95-2939
In re: MACO HOMES, INCORPORATED, Debtor.

BOB McLEMORE AND COMPANY, INCORPORATED; BOBMCLEMORE HOMES, INCORPORATED; APPLE HOMES, INCORPORATED; APPLE REALTY 2000, INCORPORATED; BMI LAND COMPANY, INCORPORATED; MACO HOMES, INCORPORATED,
Plaintiff-Appellants
v.
BRANCH BANKING & TRUST COMPANY,
Defendant-Appellee, and

HOME FEDERAL SAVINGS AND LOAN ASOCIATION OF CHARLOTTE,
Defendant-Third Party Plaintiff- Appellee
v.
ROBERT V. McLEMORE
Third Party Defendant-Appellant

BRIEF OF APPELLANTS ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

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ORIGINAL AMENDED COMPLAINT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: MACO HOMES, INC. Case No: 94-30421
Chapter 11 Debtor. Adversary proceedin
No. 94-3108

BOB MCLEMORE & CO., INC.,
BOB MCLEMORE HOMES, INC.,
APPLE HOMES,INC.; APPLE REALTY
2000, INC.; BMI LAND CO., INC.; AND
MACO HOMES, INC., Corporations,
Plaintiffs,

AMENDED COMPLAINT

vs.

BRANCH BANKING & TRUST CO., Defendant,
and, HOME FEDERAL SAVINGS
AND LOAN ASSOCIATION of Charlotte,
Defendant and third party plaintiff

v.

ROBERT V. MCLEMORE,
Third- Party Defendant

Plaintiffs, amending their original Complaint with leave of court pursuant to the provisions of Rule 7015 of the Federal Rules of Bankruptcy Procedure and Rule 15 of the Federal Rules o Civil Procedure and further complaining of the Defendants, alleg and say that:

CLAIMS AGAINST HOME FEDERAL

46. From all of the foregoing the Plaintiffs are informed and believe that Home Federal systematically created and maintained artificial defaults on certain of its loans to members of the McLemore Group while making promises and representations which were false, and known by Home Federal to be false, when made, all while Home Federal, acting primarily through Harold Barnes, continued a planned and staged withdrawal of the fundin Options of the McLemore Group, without any notice to the McLemore Group. By this clandestine course of action, Home Federal deliberately deprived the McLemore Group of operating funds, while continuing false and false and fraudulent promises and representations that Home Federal would resume the funding if only Bob McLemore would cause his various companies making up the McLemore Group to take each next step required by Home Federal, including without limitation selling assets at far below their fair market value, deeding back properties to Home Federal at far below their fair market values, and finally executing the Multi-Party Agreement in June of 1993, and the BMI Land loan workout Agreement with Home Federal dated August 30, 1993. Barnes promised specifically that, if Bob McLemore would take these various actions and sign these agreements, Home Federal would then complete the funding of several rearrangement plans which were promised from time to time by Barnes, including the Maco funding called for in the Multi-Party Agreement. Immediately after Bob McLemore executed the August 30, 1993, Agreement, however, Home Federal wrongfully notified Bob McLemore that it would not carry out any of those funding activities and that it would require full payment of all loans to the McLemore Group or foreclose on all its collateral at the end of the term of the period set out in that Agreement. At all times relevant to this Complaint, Home Federal made false representations of and concealed material facts as described in this Complaint; such

representations and concealments by Home Federal were reasonably calculated to deceive McLemore and Plaintiffs and were made with the intent to deceive McLemore and Plaintiffs; such representations and concealments did in fact deceive McLemore and Plaintiffs, who reasonably relied upon such conduct of Home Federal to plaintiffs' detriment. In the alternative, Home Federal is guilty of constructive fraud, as Home Federal took advantage of its position in a relationship of trust and confidence; breached its legal and equitable duties for the purpose of injuring Plaintiffs; and did in fact injure Plaintiffs. Home Federal committed the tort of negligent misrepresentation, as Home Federal owed McLemore and Plaintiffs a duty of care; Home Federal, in the course of its business, supplied information for the guidance of McLemore and Plaintiffs in their business; Home Federal failed to exercise due care and competence in obtaining and communicating such information; McLemore and Plaintiffs justifiably relied upon the information in numerous transactions; and as a direct and proximate result, Plaintiffs suffered harm.

47. Plaintiffs are further informed and believe that Home Federal, acting through its officers, directors, employees or other-representatives, or any one or more of them, undertook the following activities in furtherance of this plan, scheme or artifice, during 1992 and 1993, through the present time, to interfere with the ability of the McLemore Group to carry out its obligations under its various contracts with Home Federal:

a. Forced the Plaintiffs through economic coercion, duress and undue influence, thereby depriving McLemore and Plaintiffs of their exercise of free will and precluding their exercise of free and deliberate judgment, created by its actions described hereinabove, in concert with the actions which had been initiated previously by BB&T, to convert assets at a loss to meet increasingly strident and unreasonable demands for payment of various obligations and to turn over assets to

Defendants for credits or other considerations which were far below actual cash value;

b. On each occasion thereafter at which the Plaintiffs restructured their plans for recovery of their businesses and restructuring of the debt reduction program in order to satisfy new demands of Home Federal, upon which Home Federal knew Plaintiffs would rely in conducting their business thereafter, Home Federal immediately undertook a deliberate campaign to prevent the Plaintiff from carrying out the agreed plans or from meeting its newly undertaken obligations to Home Federal and otherwise actively worked to disrupt by all possible means the ability of Plaintiffs to carry out the restructuring which Home Federal had authorized and agreed to assist Plaintiffs in accomplishing, including without limitation going to persons to whom Plaintiffs were attempting to sell some of their inventory of residential properties, indicating to those persons that there was no need to purchase the properties from the Plaintiffs because Home Federal would soon take over those properties and sell them to the buyers at a lower price.

c. Failed then to close any permanent loans to McLemore customers, even in the local area, in any situation in which the trade-in home was not sold prior to closing of the permanent loan, even when the customer would qualify for such without mortgage insurance, further depriving the McLemore Group of operating income. This action was followed quickly by demands for immediate payment of loans or deeding back of properties at below market value, in lieu of foreclosure, all of which generated publicity which further harmed the efforts of the McLemore Group to continue with any semblance of normal operations, as Home Federal and BB&T knew would occur:

d. In the Spring of 1992, the Plaintiffs also began

to receive reports and other information from other developers and builders indicating that Home Federal officials had expressed to them a willingness to sell them McLemore properties at about the amount of the McLemore loans on those properties, thus creating the impression throughout the Mecklenburg real estate market that foreclosure was imminent and that no one should pay any more than the amounts of the loans for these lots, whether obtained immediately from McLemore or a little later directly from Home Federal, thus substantially destroying the ability of the McLemore Group to do business; and

e. Undertook other wrongf'ul actions, in cooperation with employees of BB&T, in furtherance of this scheme, including refusing without just cause to close loans to purchasers of properties from Plaintiffs, further damaging the Plaintiffs' business reputation and creating liabilities of various Plaintiffs to third parties under contract with them.

48. Plaintiffs are further informed and believe that:

a. During the cooperative business relationship between Home Federal and Bob McLemore, acting for the Plaintiffs, which extended for more than twenty (20) years, the normal and customary lending procedures, formalities and documentation were abandoned, and Bob McLemore and Home Federal conducted business by oral agreements and commitments with minimal paperwork in this consistent pattern; Home Federal always honored the verbal commitments it made, as did Bob McLemore, and a special relationship of trust and confidence was created with complete reliance by both parties being based upon said trust and this consistent pattern of dealing over a period of more than 20 years; and

b. Home Federal breached its contractual relationships with the Plaintiffs, breached its duty of good faith

under the North Carolina Uniform Commercial Code; breached the duties, fiduciary and otherwise, which it owed to the Plaintiffs by reason of their relationship of trust and confidence, and the joint venture or partnership relationship among the parties; breached its duty of good faith, fair dealing and honest judgment under North Carolina common law; breached its duty of due care under North Carolina common law; breached its duty not to do anything to prejudice Plaintiffs inconsistent with the parties contractual relations under North Carolina common law; wrongfully subjected the Plaintiffs to intensive economic duress and undue influence which left the Plaintiffs no option but to take each step demanded by Home Federal in the vain hope that Home Federal would honor its part of each such commitment, which it utterly and completely failed to do; and is estopped from avoiding the.promises on which the Plaintiffs reasonably relied to their detriment.

49. Plaintiffs are further informed and believe that these actions of Home Federal constitute unfair and deceptive trade practices in violation of the provisions of Chapter 75, Article 1 of the North Carolina General Statutes, because they possessed the tendency and capacity to mislead and created the likelihood of deception, improper economic coercion, duress and undue influence, interference with Plaintiffs, then existing contractual relationships with other persons, interference with other viable, potential contractual relationships many of which would have been successfully consummated to the financial benefit of Plaintiffs but for the concerted actions of BB&T and Home Federal, and misappropriation of various corporate and business opportunities, and that some of these activities may also constitute violations of certain criminal laws of the State of North Carc5lina, and might, therefore, constitute violations of chapter 75D of the-North Carolina General Statutes, known as the North Carolina Racketeering Influenced Corrupt Organizations Act ("the Act"), and the Plaintiffs reserve the right, after the completion of discovery in this action, to make a

determination as to whether or not they will seek recovery of damages under the Act. moreover, the actions of Home Federal as set forth were intentional, wilful, wanton and done in reckless disregard for the Plaintiffs' rights.

CLAIMS AGAINST BB&T

So. Plaintiffs are also informed and believe that, because such a reduction of the amount of the debt of the McLemore Group to Home Federal could not be accomplished quickly enough to suit the purposes of BB&T, BB&T began to engage in a deliberate cours of action to interfere with the lending and banking relationship of the Plaintiffs with Home Federal and other financial institutions, as well as to attack their sound business dealings, including their existing and potential contractual relationships with customers, suppliers, subcontractors and other persons within the State of North Carolina. To further this end, BB&T took the specific actions described herein for the calculated purpose of severely injuring the Plaintiffs and of placing them in a severely distressed economic position due to the intensive economic duress wrongfully created by Defendants so that the Plaintiffs would be under the complete dominion control and influence of BB&T, such that they had no choice but to take any action they were directed by BB&T to take, or accept any demand made by BB&T. By and through the actions described in this Complaint, BB&T aided and abetted (by knowingly advising, encouraging or motivating) and provided substantial assistance to Home Federal to breach its fiduciary duty to the McLemore Group and to engage in fraud and other conduct described in this Complaint. Moreover, BB&T made false representations of and concealed material facts as described in this Complaint; such representations and concealments by BB&T were reasonably calculated to deceive McLemore and Plaintiffs and were made with the intent to deceive McLemore and Plaintiffs; such representations and concealments did in fact deceive

McLemore and Plaintiffs, who relied upon such conduct of BB&T to Plaintiffs' detriment. In the alternative, BB&T committed the tort of negligent misrepresentation, as BB&T owed McLemore and Plaintiffs a duty of care; BB&T, in the course of its business, supplied information for the guidance of McLemore and Plaintiffs in their business; BB&T failed to exercise due care and competence in obtaining and communicating such information; McLemore and Plaintiffs justifiably relied upon the information in numerous transactions; and as a direct and proximate result, Plaintiffs suffered harm.

51. Plaintiffs are further informed and believe that BB&T then expected to be able to dismantle the organization of the Plaintiffs, take all of their assets and, with the active participation, or the assistance of certain officers, directors, employees or other representatives of Home Federal, purportedly for the benefit of Home Federal, but primarily for their own personal gain, to divide up all of Plaintiff's assets among BB&T and Home Federal, eliminating their loan commitments to the Plaintiffs to the point that BB&T would be able to acquire Home Federal without either any of the then existing Home Federal loans to the McLemore Group which were not assignable on a recognized market or any continuing commitment to make loans to the McLemore Group under the course of dealing which had developed over the years with Home Federal.

52. Plaintiffs are also informed and believe that, in furtherance of this plan, scheme or artifice, BB&T undertook at least the following actions:

a. Without notice and without just cause and without reasonable commercial justification called or made demand for immediate payment by the Plaintiffs of all loans under the commitments, even though there had been no adverse

change in the financial condition of Plaintiffs nor had there been any other material change in the credit qualifications of the Plaintiffs as specified in the commitments, and even though BB&T well knew that there was no material default of any type in the performance of any of the Plaintiffs under the terms of any of the commitments or any of the loan documentation, such that BB&T was required to fabricate an excuse for the demand which it knew was false and completely unjustified;

b. Widely publicized its actions throughout the business community in North Carolina, with the direct and deliberate intent of damaging Plaintiffs, other banking relationships and business relationships so as to put the Plaintiffs in such a position economically that they would be unable to resist any requests or demands of BB&T;

c. During 1992, 1993 and continuing into 1994, forced the Plaintiffs through economic coercion, duress and undue influence, depriving McLemore and Plaintiffs of their exercise of free will and precluding their exercise of free and deliberate judgment, created by its actions described hereinabove to convert assets at a loss to meet increasingly strident, unreasonable and unlawful demands for payment of various obligations and to turn over assets to BB&T for credits or other considerations which were far below actual cash value;

d. On each occasion on which the Plaintiffs restructured their plans for recovery of their business so as to meet new demands of BB&T, such as granting security interests or additional assets which had previously been clear of liens, BB&T accepted the plan and encouraged the Plaintiffs to begin implementing the plan, but also immediately began a deliberate campaign which was initially concealed from Plaintiffs but which was clearly designed to prevent the Plaintiffs from converting those assets to cash with which to meet its newly undertaken obligations to BB&T and to disrupt by all possible

means the ability of Plaintiffs to carry out such restructuring plan which BB&T had just previously authorized and agreed to assist Plaintiffs in accomplishing, including without limitation going to perso to whom Plaintiffs were attempting to sell some of its inventory of residential properties, telling those persons that there was no need to purchase the properties f rom the Plaintiffs because BB&T would soon take those properties a sell them to the buyers at a lower price;

e. Breached its contractual relationships with the Plaintiffs; breached its duty of good faith under the Nort Carolina Uniform Commercial Code; breached its duty of good faith, fair dealing and honest judgment under North Carolina common law; breached its duty of due care under North Carolina common law; breached its duty not to do anything prejudice Plaintiffs inconsistent with the parties, contractual relations under North Carolina common law; wrongfully subjected the Plaintiffs to intensive economic duress and undue influence which left the Plaintiffs no option but to take each step demanded by BB&T in the vain hope that BB&T would honor its part of each such commitment, which it utterly and completely failed to do; and is estopped from avoiding the promises on which the Plaintiffs reasonably relied to their detriment; and

f. Undertook other wrongful actions, in cooperation with employees of Home Federal, in furtherance of this scheme including foreclosure without material default on loans to Maco on rental properties which were current, self liquidating and more than adequately secured for the sole purpose of acquiring the properties at below the fair marke value, turning out the tenants into the streets, further damaging the Plaintiffs, business reputation and creating liabilities of Maco to said tenants under their lease agreements.

53. Plaintiffs are further informed and believe that

these actions of BB&T constitute unfair and deceptive trade practices in violation of the provisions of Chapter 75, Article 1 of the North Carolina General Statutes, because the actions possessed the tendency and capacity to mislead and created the likelihood of deception, improper economic coercion, duress and undue influence, interference with Plaintiffs, then existing contractu al relationships with other persons, interference with other viable, potential contractual relationships many of which would have been consummated to the financial benefit of Plaintiff but for this inter- ference by BB&T and misappropriation of various corporate and business opportunities; and that some of these activities may also constitute violations of certain criminal laws of the State of North Carolina, and might, therefore, constitute violations of Chapter 75D of the North Carolina General Statutes, known as the North Carolina Racketeering Influenced Corrupt Organizations Act ("the Act"), and the Plaintiffs reserve the right, after the completion of discovery in this action, to make a determination as to whether or not they will seek recovery of damages under the Act. Moreover, the actions of BB&T as set forth were intentional, wilful, wanton and done in reckless disregard for the Plaintiffs' rights.

ALLEGATIONS OF DAMAGES

54. The actions of both of the Defendants as described hereinabove, both individually and in combination, have caused substantial damage to the business and assets of the Plaintiffs, including but not limited to loss of profits, loss of future profits, loss of good will, damage to business reputation, loss of earning capacity, loss of present and future business opportunities, loss of assets and diminution in value of assets, loss of the benefit of present and future contracts, and Plaintiffs have incurred substantial additional business expenses, although McLemore has worked diligently to preserve to the greatest extent possible all of the assets and business of the

Plaintiffs and his other companies despite the continuing, active efforts of the Defendants to destroy his businesses. Through his extraordinary efforts, McLemore has been able to frustrate to this date the above described plans and schemes of BB&T and Home Federal because his determination, business ability and financial ability were much stronger than BB&T and Home Federal anticipated; but he and the Plaintiffs have been substantially damaged by these efforts to carry out the plans and schemes of Home Federal and BB&T as described above.

55. By reason of the foregoing, the Plaintiffs are informed and believe that they have each been damaged by an amount which is far in excess of $10,000.00 by the above described improper, illegal and tortious actions of the Defendant.

WHEREFORE, the Plaintiffs respectfully demand a trial by jury of all issues arising in this action and further respectfully pray the Court that each of the Plaintiffs have and recover all of its actual damages of and from the Defendants, jointly and severally, in the such amounts in excess of $10,000.00 as the Court or the jury determines to be their actual damages, multiplied by a factor of at least three, plus punitive damages; that all costs of this action be taxed against the Defendants, including without limitation the reasonable fees and expenses of the duly licensed attorneys for the Plaintiffs under applicable provisions of the laws of the United States and of the State of North Carolina; and that the Plaintiffs have such other and further relief as to the Court may deem just and proper under the circumstances then and there existing.

No. 96-1085

Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

BOB McLEMORE AND COMPANY, INCORPORATED, *et al.*,

Petitioners,

vs.

BRANCH BANKING AND TRUST COMPANY and HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Fourth Circuit correctly affirm the District Court's judgment granting the motions for summary judgment filed by each Respondent on the grounds that Petitioners had executed written releases that released all claims against Respondents?

LIST OF PARTIES

The respondent, Branch Banking and Trust Company is a North Carolina banking corporation. The respondent, Home Federal Savings and Loan Association of Charlotte is a savings and loan association duly organized and existing under and by virtue of the laws of the United States of America. E. Osborne Ayscue, Jr. and Robert H. Pryor of Smith, Helms, Mulliss & Moore, L.L.P., are counsel of record for Branch Banking and Trust Company. Robert C. Stephens of Horack, Talley, Pharr & Lowndes, P.A., is counsel of record for Home Federal Savings and Loan Association of Charlotte.

Each of the Respondents join in this Brief in Opposition.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Branch Banking and Trust Company is a wholly owned subsidiary of Southern National Corporation. Branch Banking and Trust Company has two non-wholly owned subsidiaries, NEXUS, Inc. and Autobase Information Systems, Inc. Home Federal Savings and Loan Association of Charlotte is a wholly owned subsidiary of HFNC Financial Corp. Home Federal has no non-wholly owned subsidiaries.

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Respondents, Branch Banking and Trust Company (hereinafter "BB&T") and Home Federal Savings and Loan Association of Charlotte (hereinafter "Home Federal") respectfully request that the Court deny the Petition for Writ of Certiorari to review the unpublished opinion of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

In 1994, Petitioners (sometimes hereinafter referred to as the "McLemore Group") filed suit against the Respondents alleging a number of claims arising out of the lending relationship which had previously existed between the Petitioners, a home building enterprise, and each of the Respondents. All claims rested on the theory that the Respondents had conspired to destroy the Petitioners in order to remove an obstacle to a planned merger between the Respondents (hereinafter referred to as the "Merger Conspiracy Theory"). BB&T moved for summary judgment based upon certain absolute defenses, including the defense that Petitioners had released all claims arising out of the alleged Merger Conspiracy Theory by reason of the McLemore Group's execution of a valid and enforceable written release in favor of BB&T. Home Federal moved for summary judgment, based on certain absolute defenses, including the defense that Petitioners had released all claims arising out of the alleged Merger Conspiracy Theory by reason of the McLemore Group's execution of a valid and enforceable written release in favor of Home Federal. The summary judgment motions were briefed and argued, in separate hearings, before a United States bankruptcy judge, who entered orders recommending that summary judgment be granted on both motions. Thereafter, the motions for summary judgment were briefed for a second time and additional documentation and exhibits were presented to a United States district court judge who agreed with the

bankruptcy judge and entered separate judgments granting summary judgment in favor of the Respondents. Both trial judges found that all claims raised in the action had been released. Petitioners appealed both judgments.

The United States Court of Appeals for the Fourth Circuit consolidated the appeals, conducted a *de novo* review of both orders of the district court's granting summary judgment and affirmed the district court's orders granting summary judgment in favor of the Respondents on all claims.

In Petitioners' Statement of Case, they argue that the Fourth Circuit's decision constitutes an extreme departure from the accepted and usual course of judicial proceedings. In essence, Petitioners simply rehash the factual and legal arguments which they made to the bankruptcy court, the district court and the Fourth Circuit concerning the merits of the underlying summary judgment motions. Because the decision of the Fourth Circuit is clearly correct, was entered after the application of the correct standard of review and simply involves the application of the facts of the case to well established state law, Respondents respectfully submit that the petition should be denied.

STATEMENT OF FACTS

A. BB&T Statement

The opinion of the Fourth Circuit correctly sets forth the facts of the case as they relate to BB&T and BB&T adopts the appellate court's statement of facts.[1]

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1. A copy of the opinion of the Fourth Circuit is reproduced in the Appendix to this Brief in Opposition.

B. Home Federal Statement

Home Federal takes issue with some of Petitioners' recitation of the facts, and like BB&T, urges the Court to review the facts set forth in the opinion of the Fourth Circuit. For convenient reference, however, certain facts which are relevant to the Court's consideration are hereinafter set forth.

1. The McLemore Group's Lending Relationship With Home Federal.

For a number of years, including the 1980's and early 1990's, the McLemore Group and Home Federal enjoyed a profitable lender-borrower relationship. Beginning in 1991, however, numerous McLemore Group loans with Home Federal totaling millions of dollars went into default for nonpayment. Rather than foreclose, Home Federal permitted those loans to remain in default and, instead, worked with the McLemore Group for over two years in an attempt to cure the deficiencies. In 1993, after a number of months of negotiations, Home Federal and the McLemore Group entered into an August 20, 1993 forbearance agreement (hereinafter the "Forbearance Agreement") which granted to the McLemore Group a six month forbearance period during which time properties could be sold and the defaulted loans could be paid. If the properties were not sold, the McLemore Group agreed to deed them back to Home Federal in lieu of foreclosure. The Forbearance Agreement also (1) gave the McLemore Group the opportunity to discount the loans by paying them off early, (2) reduced the interest rate on the loans, and (3) forgave approximately $390,000 in past due interest. The Forbearance Agreement also contained, as is customary in agreements of this type, the McLemore Group's release of all claims against Home Federal. The plain language of that agreement shows clearly that the release is a global release of all claims any member of the McLemore Group might have had against Home Federal.

The six month forbearance period expired with the loans still in default. When Home Federal requested deeds in lieu of foreclosure, the McLemore Group responded by filing this lawsuit.

Both the bankruptcy court and the district court, in addition to dismissing all of petitioners' claims against Home Federal, also entered money judgments in favor of Home Federal against the McLemore Group. In the lawsuit below, Home Federal filed counterclaims seeking the recovery of monies which had previously been loaned to the McLemore Group. Those loans had been in default for over two years and the monies had not been repaid. Robert V. McLemore was found by both trial courts to be obligated to repay these loans by reason of a November 9, 1990 guaranty (the "Guaranty") which he admits he executed. Notwithstanding his present protestations that the Guaranty applied only to loans made after November 9, 1990, Mr. McLemore affirmed the applicability of the Guaranty to loans made prior to November, 1990 when he executed the Forbearance Agreement.[2]

2. *Merger Proposals To Home Federal.*

Some time in 1989, BB&T developed an interest in acquiring Home Federal through a possible merger. From time to time, BB&T made overtures to Home Federal to merge. However, contrary to petitioners' assertions, neither Home Federal nor its officers or directors ever formed any intent to merge with BB&T or ever took any steps in order to consummate a merger with BB&T. Home Federal was an attractive institution and was the object of overtures from a number of suitor banks.

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2. The Forbearance Agreement states on page 1 that: "McLemore and BMC have personally guaranteed all of the Loans pursuant to that certain Guaranty Agreement attached hereto as *Exhibit B* (the 'Guaranty')." The loans referred to in this quote were entered into **prior** to November 9, 1990.

While Home Federal gave some consideration to merger proposals made by a number of banks, including BB&T, it also gave consideration to other scenarios for its future, including conversion to a state-chartered savings and loan association or becoming a publicly-held entity (the choice the institution made in 1995). For reasons which are still unclear to respondents, petitioners incorrectly theorized that the McLemore Group's lending relationship with Home Federal was somehow an obstacle to the merger and that the relationship had to be terminated in order for the merger to go forward. Petitioners' belief in this respect is incorrect. Home Federal's loans to the McLemore Group would not have prevented a merger. More importantly, there was never any agreement, in spirit, principle or otherwise, to merge these two institutions. The claim that these two financial institutions would, over a period of time, conspire with one another to destroy one of Home Federal's largest borrowers and thereby cause millions of dollars of Home Federal loans to go into default under the critical eye of federal regulatory agencies is a preposterous and fictitious claim.

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

Petitioners misstated or miscnaracterized both the facts and the holding of the Fourth Circuit in an attempt to support their assertion that this case "clearly calls for the invocation of this Court's supervisory powers" (Petition, p. 12).[3] Pursuant to Supreme Court Rule 15.2, Respondents will identify and discuss the most prominent of the misstatements or omissions of fact contained in the Petition.[4] As an initial matter, respondents point

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3. Citations to "Petition, p. __", refers to Petitioners' petition.

4. Because this case was dismissed pursuant to Fed. R. Civ. P. 56, the facts are taken in the light most favorable to the Petitioners.

out that the Petitioners have failed to accurately reproduce the Fourth Circuit's opinion and the district court's findings and conclusions. Because the Fourth Circuit's opinion is critical to the understanding of this Brief in Opposition, Respondents have reproduced a correct version of the opinion of the Fourth Circuit in the Appendix to this Brief in Opposition.

- Petitioners mislead the Court regarding BB&T's lending commitments.

Petitioners argue that BB&T led McLemore to believe that its lending commitments were of long-term duration (Petition, p. 8). The undisputed facts show that BB&T and the Petitioners entered into fully integrated written agreements that specified all the terms that would apply to the loans, including the expiration date of the commitment to lend. (App., p. 6a)[5]. The final lending agreement between BB&T and McLemore clearly specified that the lending commitment expired on September 1, 1992. (App., p. 6a).

- Petitioners misrepresent the relationship between Robert V. McLemore and the principal officers of Home Federal, H. Joe King, Jr. and J. Harold Barnes, Jr. (Petition, p. 8)

The relationship between the McLemore Group and Home Federal was nothing more than that of a lender-borrower. It did not rise to a level above that. In furtherance of that relationship, King and Barnes represented Home Federal as two of its officers and employees.

- Petitioners incorrectly allege that Messrs. King and Barnes approved the McLemore Group's proposed expansion plan.

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5. Citations to "App., p. __" refer to the Appendix attached to this Brief in Opposition.

Petitioners argue that Home Federal approved the McLemore Group's expansion plans and orally agreed to fund those plans. (Petition, p.8) Home Federal never approved any expansion plan proposed by the McLemore Group and never committed to make loans to fund any such expansion plan.

- Petitioners fail to inform the Court that the Fourth Circuit expressly determined that it need not consider the parties' other arguments concerning the statute of frauds, the statute of limitations or contract defenses because it found that the releases barred all the Petitioners' claims and finally disposed of the action.

Petitioners argue that the Fourth Circuit ignored certain issues that had been presented to it for its determination. (Petition, p. 17-18). On the contrary, the Fourth Circuit ruled on a well established issue of law that rendered the other issues presented irrelevant and moot and stated, in its opinion, that it need not consider the other issues. (App., p. 12a).

- Petitioners fail to bring to the Court's attention that Mr. McLemore was examined at length concerning the date on which the McLemore Group's alleged claims against the Respondents occurred and that he testified that each of the alleged "wrongful acts" occurred on or before the date the releases were executed.

Petitioners argue that the releases were applied to claims that occurred after the execution of the releases. Detailed deposition testimony from Mr. McLemore does not support this argument.

- Petitioners misrepresent that the facts alleged in their statement of facts were not in dispute.

Petitioners state that the facts alleged in their factual summary and statement of the case were "not disputed" (Petition, p. 7). Many of Petitioners' allegations are either disputed or allege facts which are not supported by any competent evidence. However, these underlying factual disputes are not material because the Petitioners executed written releases, releasing all the claims that could possibly arise from such disputed allegations. Because these allegations do not bear on the issues before this Court, the Respondents will not address each misstatement.

REASONS FOR DENYING THE WRIT

Petitioners argue that certiorari should be granted ". . . because the United States Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings that the supervisory power of this Court must be exercised to correct that departure" (Petition, p. 23). Petitioners claim that they were not given ample opportunity to present matters to the lower courts and that, consequently, they did not receive a fair hearing (Petition, p. 20). These claims are simply inventions created by Petitioners as a part of one last attempt to seek appellate review.[6]

In this case, an experienced bankruptcy court judge and an experienced district court judge, affirmed by a unanimous court of appeals, carefully reviewed the voluminous record that was submitted by Petitioners and, after considering the evidence in the light most favorable to the Petitioners and applying North Carolina law, concluded that the releases executed by the Petitioners bar their claims against BB&T and Home Federal as a matter of law. The Fourth Circuit's opinion is correct. More

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6. Certiorari is not a vehicle by which a party who loses in the lower courts secures another hearing. *Langum Co. v. Coty*, 262 U.S. 159, 163 (1923).

importantly, for the purposes of analyzing Petitioners' plea to this Court, it is substantively unremarkable and can hardly be said to raise important matters sufficient to invoke this Court's certiorari powers. All of the issues raised by the Petitioners concern the interpretation of state law and the application of facts to that law. None of the interpretations of state law by the Fourth Circuit conflict, in any way, with well established North Carolina law. None of the issues raised by the Petitioners deal with federal law or other matters typically of concern to this Court, and none could even arguably merit this Court's attention. Distilled to its essence, the Petitioners complain because they simply disagree with the decision of the bankruptcy court, the district court and the Fourth Circuit.

I.

THIS CASE AND THE HOLDINGS BELOW DO NOT INVOLVE SUCH SPECIAL, COMPELLING OR IMPORTANT ISSUES SO AS TO WARRANT THE GRANTING OF CERTIORARI.

This case is about the dismissal of claims, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that the McLemore Group had entered into valid and enforceable written agreements releasing those claims. That is all that this case is about. Even Petitioners concede that this case simply involves ". . . the propriety of disposition of a case through summary judgment under F.R.C.P. Rule 56" (Petition, p. 6).

The concept that claims may be released is a common law cornerstone which has existed in law for centuries. State and federal trial courts throughout the land routinely hear and grant motions for summary judgment. There is nothing so "compelling" in these facts or these holdings as to require the

Supreme Court of the United States to exercise supervisory powers over the United States Court of Appeals for the Fourth Circuit.

Petitioners also ask this Court to analyze particular facts and interpret and determine the scope of particular written agreements which are peculiar to this case and this case alone. No questions are presented which have importance beyond the particular facts and parties involved. A considerable portion of the Petition is devoted to criticizing the rulings below by contending that the specific language of the releases and the Guaranty do not support those rulings. Certiorari should not be granted to construe particular written agreements, consider specific facts or review evidence on issues not of importance to other litigants, the courts or the general public. *United States v. Johnson*, 268 U.S. 220 (1925).

II.

THE JUDGMENT BELOW WAS PROPER IN ALL RESPECTS.

Petitioners argue that this Court should exercise its supervisory powers because the decision below was erroneous. There is no merit to that claim.

A. The Fourth Circuit's Ruling On The Release Of BB&T And Home Federal Was Correct And Consistent With North Carolina Law.

North Carolina recognizes that a "defendant's plea of a release is a plea in bar going to the plaintiff's entire cause of action, and if established by proof, would defeat and destroy [the plaintiff's] action altogether." *Cowart v. Honeycutt*, 257 N.C. 136, 139, 125 S.E. 2d 382, 384 (1962). In the instant case, the

Petitioners executed releases of both BB&T and Home Federal and received consideration for the releases. The language of the releases encompasses any and all claims and include the claims that the Petitioners are attempting to assert against BB&T and Home Federal in this action. The releases are a complete bar to the Petitioners' claims against BB&T and Home Federal.

The Petitioners argue that "the rulings represent an extreme departure from the accepted and usual course of judicial proceedings" because the release agreements were applied to post-release claims (Petition, p. 16). The only "evidence" upon which Petitioners relied to support this claim is found in Mr. McLemore's Supplemental Affidavit, an affidavit which was filed approximately one month *after* the BB&T summary judgment hearing. In the supplemental affidavit, McLemore states:

> Home Federal's and BB&T's wrongful conduct, as described in the Amended Complaint, continued through 1993.

This untimely, vague and conclusory statement directly contradicts McLemore's earlier deposition testimony. Mr. McLemore testified, in response to detailed questions in his deposition about each of the Petitioner's claims, that the alleged wrongful acts upon which the Petitioners were basing the action related to matters that transpired on or before the date the releases were executed. The Fourth Circuit did not depart from the usual and accepted course of judicial proceedings but, instead, followed the well-articulated rule that a genuine issue of material fact is not created and, therefore, the entry of summary judgment is not precluded when the only issue of fact is to determine which of two conflicting versions of a party's testimony is correct. *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984) (" 'If a party who has been examined at length

on deposition could raise an issue of fact by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment for screening out sham issues of fact.' " *Id.* at 960. (quoting *Perma Research and Development Co. v. Singer*, 410 F.2d 572, 578 (2nd Cir. 1969))

Petitioners accuse the Fourth Circuit of ignoring evidence and authorities on Petitioners' argument that fraud voided the releases. Nothing could be further from the truth. The allegations of fraud and "fraud in the treaty" were briefed and argued at length by Petitioners. The court of appeals clearly considered those arguments and rejected those arguments, holding that ". . . the McLemore Group was not induced by fraud to enter into the workout agreements with BB&T and Home Federal." (App., p. 12a). In doing so, the Fourth Circuit followed established North Carolina law.

Petitioners argue they did not have ample opportunity to present matters before the courts below and that they did not, therefore, receive a fair hearing (Petition, p. 20). Actually, the reverse is true. The summary judgment motion by BB&T was argued in November of 1994. The summary judgment motion by Home Federal was argued in March, 1995. For *each* motion, Petitioners had an opportunity at the bankruptcy court level and at the district court level to argue against the granting of summary judgment and to raise issues regarding the validity and scope of the release agreements. They took full advantage of those opportunities. Legal briefs, exhibits and other evidence in plentiful amounts were presented to the bankruptcy judge on two occasions and to the district court judge on a third occasion. On appeal to the Fourth Circuit, Petitioners requested and were granted the opportunity to file a brief in excess of the normal page limits. They submitted to the court of appeals an appendix consisting of eleven volumes and containing 3,949 pages.

Notwithstanding all of that, two trial judges granted summary judgment and a panel of the United States Court of Appeals for the Fourth Circuit affirmed that ruling in an unpublished *per curiam* opinion.[7]

Thereafter, the entire United States Court of Appeals for the Fourth Circuit denied Petitioners' request for rehearing and rehearing *in banc*.

B. The Fourth Circuit Correctly Refused To Issue An Advisory Opinion On Moot Issues.

Petitioners fault the Fourth Circuit for failing to address their arguments regarding the statute of frauds, statute of limitations and various contract defenses that were raised in the proceedings below. The trial courts did find that there were alternative reasons (*i.e.*, the statute of frauds, the statute of limitations and the argument that alleged oral loan commitments were missing terms required to make them legally enforceable) to grant summary judgment in Respondents' favor. The Fourth Circuit, following well-established precedent, simply noted that it was not going to address those issues because the issue which it did address, the releases, fully and finally disposed of the action in its entirety. *See Karsten v. Kaiser Foundation Health Plan*, 36 F.3d 8 (4th Cir. 1994) (holding it would be inappropriate to engage in the practice of advisory opinion-making which would simply generate *dicta).* More particularly, the Fourth Circuit held:

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7. The fact that the opinion is unpublished is significant. Under the Fourth Circuit's Local Rules, an opinion is published only if it satisfies a number of standards, including whether the opinion establishes, alters, modifies, clarifies or explains a rule of law, or involves a legal issue of continuing public interest. (Local Rule 36(a) of the Fourth Circuit) According to Local Rule 36(c), the Fourth Circuit will not usually cite an unpublished opinion and use of unpublished opinions in briefs and oral arguments is disfavored.

> We agree with the district court that the release provisions in the workout agreement is a valid defense against all of the McLemore group's claims against BB&T and Home Federal. Therefore, we need not consider the McLemore group's other arguments.

(App., p. 12a)

Similarly, Petitioners complain that the court of appeals made no reference to their argument that the Guaranty did not cover loans made prior to the date the Guaranty was executed.[8] They also argue that the Fourth Circuit failed to make a reference to their claim that the Home Federal release was limited to claims pertaining to certain loans.[9] Such references are not required. Local Rule 36(b) of the Fourth Circuit's Federal Rules of Appellate Procedure provides that unpublished opinions may not discuss or set out all facts or all of the background of the case, and that in unpublished opinions, the court may simply adopt the reasoning of the lower court.

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8. After reviewing the Guaranty, the district court specifically found that, pursuant to the Guaranty, Mr. McLemore became a guarantor of all Home Federal loans, **past and present**. (Petition, p. A-44).

9. *See* Petition, p. A-71 which set out the language of the Home Federal release. Therein, the McLemore Group releases all defenses, setoffs, offsets, equities, counterclaims or other claims arising out of the course of dealing between Home Federal and the McLemore Group.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ARGUED APRIL 5, 1996

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2938

In Re: Maco Homes, Incorporated,

Debtor.

Bob McLemore and Company, Incorporated; Bob McLemore Homes, Incorporated; Apple Homes, Incorporated; Apple Realty 2000, Incorporated; BMI Land Company, Incorporated; Maco Homes, Incorporated,

Plaintiffs-Appellants,

v.

Branch Banking & Trust Company; Home Federal Savings and Loan Association of Charlotte.

Defendants-Appellees.

v.

Robert V. McLemore,

Third Party Defendant-Appellant.

Appendix A

No. 95-2939

In Re: Maco Homes, Incorporated,

Debtor.

Bob McLemore and Company, Incorporated; Bob McLemore Homes, Incorporated; Apple Homes, Incorporated; Apple Realty 2000, Incorporated; BMI Land Company, Incorporated; Maco Homes, Incorporated,

Plaintiffs-Appellants,

v.

Branch Banking & Trust Company; Home Federal Savings and Loan Association of Charlotte.

Defendants-Appellees.

v.

Robert V. McLemore,

Third Party Defendant-Appellant.

Appeals from the United States District Court
for the Western District of North Carolina, at Charlotte,
Graham C. Mullen, District Judge.
(CA-95-60-3-MU, CA-95-4-3-MU, BK-94-30421)

Argued: April 5, 1996

Decided: September 10, 1996

Appendix A

Before RUSSELL and MOTZ, Circuit Judges, and LAY, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wyatt B. Durrette, Jr., DURRETTE, IRVIN & BRADSHAW, P.C., Richard, Virginia for Appellants. Edwin Osborne Ayscue, Jr., SMITH, HELMS, MULLISS & MOORE, L.L.P., Charlotte, North Carolina, for Appellee Branch Banking; Robert C. Stephens, HORACK, TALLEY, PHARR & LOWNDES, Charlotte, North Carolina for Appellee Home Federal. **ON BRIEF:** William O. Quirey, Hammarstrom Davies, Durham, North Carolina for Appellants. Robert H. Pryor, SMITH, HELMS, MULLIS & MOORE, L.L.P., Charlotte, North Carolina, for Appellee Branch Banking, G. Robert Turner, III, Zipporah Marie Basile, HORACK, TALLEY, PHARR & LOWNDES, Charlotte, North Carolina, for Appellee Home Federal.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Bob McLemore & Co., Inc. ("BMC") and its subsidiary companies (collectively, the "McLemore group"), brought numerous claims against Home Federal Savings & Loan Association of Charlotte ("Home Federal") and Branch Bank

& Trust Co. ("BB&T"). On the defendants' motions for summary judgment, the district court dismissed all claims against the defendants because the McLemore group had previously executed valid, written agreements releasing the defendants from all such claims. The McLemore group allege that they entered into those written releases under fraud and duress. We agree with the district court's finding that no fraud or duress occurred, and we affirm the judgment of the district court.

I.

Robert V. McLemore is the president and sole shareholder of BMC, which is engaged in land development and home construction. BMC is the corporate parent of BMI Land Co., Inc., ("BMI Land"), Bob McLemore Homes, Inc. ("BMH"), Apple Homes, Inc. ("Apple Homes"), Apple Realty 2000, Inc. ("Apple Realty"), and MACO Homes, Inc. ("MACO Homes"). BMI Land is engaged in the purchase and development of tracts of land for home construction. BMH and Apple Homes are engaged in the construction of new homes. To induce customers to purchase new homes, McLemore created the "trading places" program; under this innovative program, a person who signed a construction contract for a new home with BMH or Apple Homes could trade in his existing home, which the McLemore group agreed to sell before the completion of the new home. Apple Realty was created to list and sell the new home buyers' existing homes. If Apple Realty could not sell the existing home before the closing of the new home, MACO Homes would purchase the existing home and manage it as rental property.

Since 1972, the McLemore group worked closely with Home Federal to finance all phases of its construction operations. When the McLemore group wanted to begin development of a

property, Home Federal would make the initial acquisition and development loan to BMI Land. When BMH or Apple Homes sold lots to individual home buyers, Home Federal would make the construction loans to McLemore and use the proceeds of those loans to pay down the initial acquisition and development loan. After construction of the new homes and upon closing with the home buyers, Home Federal made the permanent mortgage loans to the home buyers and used the proceeds to pay down the construction loans. If necessary, Home Federal made a second permanent mortgage loan to finance the sale of the customer's existing home either to a third-party or to MACO Homes. For many years, the McLemore group and Home Federal enjoyed an extremely close and very profitable financing relationship.

In 1988, the McLemore group proposed a drastic expansion in the scope of its business — from three to nineteen residential development projects. Home Federal approved the financing of the new construction, and the McLemore group began purchasing and developing tracts of land.

In August 1989, however, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA"), which necessarily altered the McLemore group's financing relationship with Home Federal. FIRREA imposed a requirement on thrift institutions that prevented them from extending more than 15% of its unimpaired capital to a single borrower. Although a thrift could seek and receive a waiver from the Office of Thrift Supervision ("OTS"), allowing it to loan up to 30% of its unimpaired capital to a single borrower, even the 30% limit restricted Home Federal's ability to continue financing the McLemore group's activities in the same manner as it had in the past.

Appendix A

Because Home Federal could no longer meet all of the McLemore group's financing needs, the McLemore group started doing business with BB&T, which had actively sought the McLemore group as a client. On March 28, 1990, BB&T executed a commitment to loan the McLemore group seven million dollars — one million dollars to BMI Land for land development, five million dollars to BMH and Apple Homes for homes construction, and one million dollars to MACO Homes for the purchase of rental homes. On August 7, 1991, BB&T and the McLemore group executed another commitment agreement that replaced the March 28, 1990 agreement. The terms of the August 7, 1991 agreement specified that the commitment to lend expired on September 1, 1992. Between March 1990 and June 1992, BB&T made loans to the McLemore group in accordance with the terms of the commitment agreements.

By June 1992, however, BB&T had determined that the financial condition of the McLemore group was deteriorating. One June 24, 1992, BB&T informed the McLemore group that it would not renew its commitment to provide financing beyond the September 1, 1992 expiration date of the August 7, 1991 agreement. BB&T and the McLemore group negotiated a schedule by which the McLemore group would repay its outstanding debts to BB&T. The parties executed a repayment agreement on October 5, 1992. By December, 1992, the McLemore group had defaulted under the terms of the repayment agreement. The parties began negotiating a workout agreement for the McLemore group's defaults.

On April 8, 1993, the McLemore group and BB&T executed a written workout agreement. Under this agreement, BB&T accepted the deeds to certain properties and released the

McLemore group from its indebtedness on those properties, thus avoiding the need for foreclosure proceedings. BB&T also extended some of the McLemore group's obligations and loaned additional money to pay certain liens and interest payments, thus giving the McLemore group an opportunity to work out the defaults on some of the properties. The McLemore group also released BB&T from any and all claims known or unknown, absolute or contingent, matured or unmatured that the McLemore group had against BB&T. During the course of the negotiations culminating in the workout agreement, the McLemore group was represented by counsel.

The McLemore group subsequently defaulted on the terms of the April 8, 1993 workout agreement, and BB&T foreclosed on the remaining properties.

Meanwhile, the McLemore group's financial position with Home Federal had also deteriorated. The McLemore group defaulted on its Home Federal loans in 1991. As it had done in the past, Home Federal worked with the McLemore group to bring the loans current. By June 1993, MACO Homes had defaulted on all its loans from Home Federal, as well as its loans from Southern National Bank of North Carolina ("Southern National") and United Carolina Bank ("UCB"). After a series of negotiations, the McLemore group, Home Federal, Southern National, and UCB entered an agreement, in which the three banks loaned MACO Homes additional funds to bring its loans current.

By July 1993, the McLemore group remained in default on the acquisition and development loans to BMI Land and the home construction loans to BMH. The McLemore group and Home Federal negotiated a workout agreement, which the parties

executed on August 20, 1993. Under this agreement, Home Federal granted the McLemore group a six-month forbearance period on its defaults, giving the McLemore group a chance to sell properties and pay down its indebtedness. Home Federal also reduced the interest rate on certain loans during this forbearance period, and it forgave $390,206 in past due interest. The workout agreement also included the McLemore group's release from any claims that the McLemore group had against Home Federal. The McLemore group was represented by counsel when it negotiated and signed the workout agreement with Home Federal.

The McLemore group was unsuccessful in its efforts to sell properties and to pay down its outstanding debt. At the end of the forbearance period, the McLemore group's loans remained in default. Home Federal informed the McLemore group of its obligation under the workout agreement to deliver the deeds to Home Federal in lieu of foreclosure.

In response, the McLemore group filed a complaint against Home Federal and BB&T in North Carolina state court on February 22, 1994. When three of the McLemore group companies filed for bankruptcy, this action was removed to the United States Bankruptcy Court for the Western District of North Carolina. In two separate entries of proposed findings of fact and conclusions of law, the bankruptcy court recommended the entry of summary judgment on all claims against Home Federal and BB&T because, *inter alia*, the April 8, 1993 workout agreement and the August 20, 1993 workout agreement released Home Federal and BB&T from all of the claims brought by the McLemore group. The district court adopted verbatim the bankruptcy court's proposed findings of fact and conclusions of law. The McLemore group filed a timely appeal.

Appendix A

II.

We review the district court's grant of summary judgment de novo. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). Although the district court asserted several reasons for dismissing the McLemore group's claims, its primary reason was the existence of the release provisions in the April 8, 1993 and August 20, 1993 workout agreements. The McLemore group contends that the district court should not have enforced the release provisions for two reasons: first, the McLemore group signed the workout agreements under duress, and second, the McLemore group was defrauded into signing the workout agreements. We consider each argument in turn.

A. *Duress*

Under North Carolina law, a person who enters into a contract under duress can avoid his obligations under that contract. Duress exists "where one by the unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Adder v. Holman & Moody, Inc.*, 219 S.E.2d 190, 194 (N.C. 1975). Although duress may arise from the wrongful use of physical force or threats of physical force, it can also arise from the wrongful exertion of economic pressure. However, not every imbalance in economic power creates a situation of economic duress. Economic duress arises from the illegitimate use of economic power outside the bounds of a contract or the law. *See Rose v. Vulcan Materials Co.*, 194 S.E.2d 521, 536 (N.C. 1973). Thus, the mere threat by one party to breach a contract, though wrongful, does not establish economic duress. *Id.* Economic duress occurs when a party's wrongful action forces another to make a contractual promise, or else suffer irreparable

injury to his business. *See id.* In addition, the wronged party must have "no immediate and adequate remedy in the courts" that would enable him to resist the other's demands. *Id.*

The McLemore group contends that it signed the workout agreements under duress. We disagree for two reasons. First, neither BB&T nor Home Federal exerted any undue economic pressure on the McLemore group. The threat of foreclosure certainly pressured the McLemore group into signing the workout agreements, but BB&T and Home Federal had the legal right to threaten foreclosure because the McLemore group defaulted on its loans. Neither BB&T nor Home Federal created the McLemore group's weak financial position, thus forcing it to negotiate workout agreements from a weak bargaining position.[1]

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1. The McLemore group alleges that Home Federal created artificial defaults by deliberately misapplying the McLemore group's loan payments: instead of using loan payments first to pay off any interest due and then to pay down principal, Home Federal began applying the entire loan payment to pay down principal, thus allowing the McLemore group to fall behind on interest payments. The McLemore group has supported its allegations with verified affidavits, and we do not resolve this factual dispute at this stage of the proceedings.

Nonetheless, such misconduct, even if it occurred, would not establish that the McLemore group signed the workout agreement with Home Federal under duress. If Home Federal had misapplied loan payments, the McLemore group either knew or should have known of this fact before it signed the workout agreement. Although the McLemore group trusted Home Federal to handle the accounting of its loan payments, it had a duty to make at least some inquires to ensure that Home Federal kept the books correctly. Certainly by the time Home Federal threatened foreclosure proceedings, the McLemore group should have investigated to ensure that Home Federal had correctly applied the loan payments to its debts. By signing the workout agreement, the McLemore group chose to release Home Federal from its misconduct in exchange for a forbearance period to cure its loan defaults.

Second the undisputed evidence in the record demonstrates that, as an alternative to signing the workout agreements, the McLemore group could have sought the protection of the bankruptcy code. Instead, and with the hopes of savings its business, the McLemore group chose to enter workout agreements that released BB&T and Home Federal from any actions it could pursue against them. Because the McLemore group had an alternative to signing the workout agreements, it cannot argue that it entered those agreements under duress.

B. *Fraud*

Next, the McLemore group contends that BB&T and Home Federal, on several occasions, represented to it that BB&T and Home Federal were not planning a merger. The McLemore group alleges that BB&T and Home Federal began merger negotiations as far back as 1989, culminating in a merger agreement at the end of 1993. The McLemore group also alleges that Home Federal represented to the McLemore group that the OTS had denied Home Federal a 30% waiver in 1992, when in fact Home Federal never applied for such a waiver. Furthermore, the McLemore group alleges that Home Federal misapplied the McLemore group's payments, causing the McLemore group to fall behind in its interest payments and to default on its loans. The McLemore group argues that it would not have signed the workout agreements if it had known about the defendants' fraud.

Although the McLemore group's allegations may serve as the basis of fraud actions against BB&T and Home Federal, the McLemore group released the defendants from such actions in the workout agreements. There is no evidence in the record that BB&T and Home Federal fraudulently induced the McLemore group to sign the release agreements. With regard to each of the

two workout agreements, the district court found that the McLemore group actively participated in the negotiations, reviewed drafts of the agreement, and made changes to the agreement. The McLemore group was represented by counsel throughout the negotiations and the signing of the agreements. The district court found that the McLemore group knew that each workout agreement contained a release provision when it signed the agreement.

Like the district court, we conclude that the undisputed facts demonstrate that the McLemore group was not induced by fraud to enter into the workout agreements with BB&T and Home Federal.

III.

We agree with the district court that the release provision in the workout agreements is a valid defense against all of the McLemore group's claims against BB&T and Home Federal. Therefore, we need not consider the McLemore group's other arguments. We affirm the district court's entry of summary judgment in favor of the defendants on all claims.

AFFIRMED

APPENDIX B — RULES INVOLVED

FOURTH CIRCUIT RULES

LOCAL RULE 36(a). PUBLICATION OF DECISIONS

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticize existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgements only if the opinion has been in circulation for ten days.

Adopted effective December 1, 1995.

Appendix B

LOCAL RULE 36(b). UNPUBLISHED DISPOSITIONS

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published and certain unpublished opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. All opinions are available on ABBS, the Appellate Bulletin Board System, for a minimum of six months after issuance. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

Adopted effective December 1, 1995.

Appendix B

LOCAL RULE 36(c). CITATION OF UNPUBLISHED DISPOSITIONS

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

Adopted effective December 1, 1995.